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No. 669

In the Supreme Court of the United States

October Term, 1964

THE KLIX CORPORATION, Petitioner

vs.

CABLE VISION, INC. and IDAHO MICROWAVE, INC., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

The KLIX Corporation respectfully prays that a Writ of Certiorari be issued out of and under the seal of this court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on the 15th day of July, 1964.

I. OPINIONS BELOW.

The opinion and supplemental opinion of the District Court are reported at 211 F. Supp. 47. The said

opinions are attached to the petition as Appendix A.[1] The opinion of the Court of Appeals is reported at 335 F(2d) 348. It is attached to this Petition as Appendix B.[2]

2. JURISDICTION.

The judgment of the Court of Appeals was entered on July 15, 1964. A Petition for Rehearing was denied on September 22, 1964. (R. 744). The jurisdiction of this court is invoked under the provisions of Section 28 U.S.C.A. Sec. 1254(1).

III. QUESTIONS PRESENTED.

The District Court determined that, under the laws of Idaho, Respondents' conduct constituted tortious interference with the economic benefits conferred upon Petitioner by contracts between it and program suppliers and, as well, unfair competition.[3] The Circuit ruled that the decisions of this court in *Sears, Roebuck & Co. v. Stiffel* (1964), 376 U.S. 225 11 L. Ed. (2d) 661, 84 S. Ct. 784, and *Compco Corp. v. Day-Brite Lighting, Inc.* (1964) 376 U. S. 234, 11 L. Ed. (2d) 669, 84 S. Ct. 779, were dispositive and precluded the application of state law.[4] The questions presented are:

> A. Does state protection of uncopyrighted or uncopyrightable program material necessarily conflict with the federal policies established by the Copyright Act?

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(1) R. 649-672, 681-687. Findings of Fact and Conclusions of Law are found at R. 688-707.
(2) R. 733-742.
(3) Finding No. 22, R. 699, 211 Fed. Supp. 58, 59.
(4) 335 F(2d) 350, 351.

B. Are television programs which are not copyrightable for mechanical reasons protectible under state law?

C. Are television programs which are not copyrighted and not published protectible under state law pursuant to 17 U.S.C.A. Sec. 2?

D. Are television programs which are not copyrighted or not copyrightable necessarily in the public domain?

E. Are the states denied the application of remedies for the traditional torts (interference with contractual benefits) simply because the subject matter of the contract is copyrighted material?

F. Does the composite doctrine of *Sears* and *Compco* prohibit the application of state law respecting tortious interference with contractual relationships and unfair competition where the subject matter is not in the public domain?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional provision involved is:

> "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;" Article I, Sec. 8.

Relevant provisions of the Copyright Act (17 U.S.C.A.) are as follows:

"Sec. 1. Exclusive rights as to copyrighted works.

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

* * * *

(d) To perform or represent the copyrighted work publicly if it be a drama, or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced . . ."

* * * *

"Sec. 2. Rights of author or proprietor of unpublished work.

Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or

use of such unpublished work without his consent, and to obtain damages therefor."

* * * *

"Sec. 101. Infringement.

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction.—To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . "

V. STATEMENT OF THE CASE.

Petitioner owns and operates a television station in Twin Falls, Idaho.(5) Its only income is from advertisers who either pay monies directly to Petitioner or indirectly as the result of arrangements between advertisers and television networks in whose income Petitioner shares. The inducement for advertisers to avail themselves of Petitioner's services is the ability of the station to obtain as large a listening and viewing audience as is practicable. Both the rate and amount of compensation to Petitioner are determined to a substantial extent by the size of its audience and the degree to which it can demonstrate to advertisers and advertising agencies that television viewers in Twin Falls, Idaho and its market area see and hear the programs

(5) Finding No. 2, R. 689.

which it telecasts.(6) To attract viewers, Petitioner acquired for cash or other consideration the right to telecast various television programs. They consisted of: (a) programs originated and released by one or the other of the three national television networks; (b) motion picture films conceived and produced for display on television; (c) motion picture films originally conceived and produced for release in commercial motion picture theaters, these films having been converted to use on television.(7) The programs are either copyrighted or not copyrightable because they are produced simultaneously with their release, or not copyrighted because their creator simply chose not to obtain that kind of protection.

The trial court found that Petition obtained from the various program suppliers with which it had contracts the right to display first and exclusively on television facilities in the community of Twin Falls, Idaho the television programs which were the subject of such contracts and which the station released.(8) No defense was pleaded to the effect that the respective program suppliers had not obtained the power to grant Petitioner the exclusive rights, or that the rights subject to the contracts were in the public domain.(9)

Respondent Cable Vision, Inc., owns and operates a so-called community antenna system in Twin Falls,

(6) Findings No. 2, 4, 5, R. 689-690.
(7) Finding No. 6, R. 690, 691.
(8) Finding No. 7, R. 691.
(9) cf. Reply to Counterclaim, R. 42-46. Respondents did assert the position, orally, at the hearing, that the licensor was a necessary party. Vol. 3 of transcript, p. 263. This question was decided against Respondents by the District Judge on the theory that Petitioner's claim was not for infringement but based upon tortious interference with Petitioner's contracts. Respondents did not attempt to show that a single program was in the public domain in the sense of Compco and Sears articles.

Idaho. It has constructed cables throughout Twin Falls, Idaho, and offers television service to subscribers. The subscribers' sets are connected to the cables by means of drop lines. Cable Vision, Inc., obtains television signals of stations broadcasting in Salt Lake City, Utah by means of microwave facilities of Idaho Microwave, Inc., and a complex system of cables, amplifiers and other electronic equipment. It delivers such signals conveying television programs to its subscribers.

All or substantially all of the same programs subject to the contracts with Petitioner are telecast by the Salt Lake City stations either simultaneously with or prior to Petitioner's release. Respondent's customers view the programs from Salt Lake City rather than through Petitioner's transmitter. Respondent's subscribers see the identifications of the Salt Lake City stations and the commercial announcements telecast by them and the Salt Lake City stations are credited with such additional audience by national survey organizations and national advertisers.(10)

The subscribers are charged a connection fee for initial hookup to the system, and in addition, a recurring monthly charge of some four to five dollars per month. The service of Cable Vision, Inc., is admittedly commercial and its operators expect to realize a profit. Respondents do not pay any consideration to the Salt Lake stations or to any program supplier. They simply pick up the programs and distribute them without recognizing anyone else's rights in the programs or the telecasting processes.(11) Respondent Cable Vision,

(10) Finding No. 20, R. 698, 699.
(11) Findings No. 13, 14, 16, R. 696-698.

Inc., holds itself out as responsible for bringing the television programs in question to its subscribers, and takes credit for them in its solicitation of customers.(12)

The trial court held that the conduct and activities of Cable Vision, Inc., interfere with the lawful and advantageous contractual and business relationships between Petitioner and its various program suppliers in that such activities prevent Petitioner from having and enjoying the right to display first and exclusively on its television station the programs which are subject to such contracts.(13) It found that the Respondents' activities tended to deprive Petitioner of audience which it would otherwise enjoy and deprive it of good will, and thus tended to reduce and curtail its ability to attract advertisers and to decrease the amount of its revenue.(14) The trial court also applied state law to determine that Respondents' activities constituted unfair competition.(15) The court held that the contractual relationships between Petitioner and its program suppliers were valid and permissible under applicable Communications Commission regulations.(16) The decree of the District Court was framed to prohibit the Respondents, and particularly Respondent Cable Vision, Inc., from releasing simultaneously with or prior to the release by the KLIX Corporation the television programs subject to the various contracts.(17)

(12) Finding No. 16, R. 697. Samples of its advertisements are in evidence. See R. 90-93, Ex. B to affidavit of George C. Hatch. Typical language is "Cable Vision brings you more [naming the popular programs]" and "Cable Vision brings you an additional 100 shows a week . . ."
(13) Finding No. 22, R. 699. Conclusions of Law No. 5, R. 705.
(14) Finding No. 22, R. 699.
(15) 211 F. Supp. 58, 59. Finding No. 23, R. 699, 700.
(16) Finding No. 26, R. 700; 211 F. Supp. 57.
(17) Finding No. 30, R. 701-7.2, Conclusions of Law No. 8, R. 705, 706.

The decree did not preclude any release by Respondents of a given program after Petitioner's telecast and the decree was effective only as to programs subject to contracts whereby Petitioner had obtained exclusive television rights in Twin Falls. No distinction was made in the decree between programs which were copyrighted and programs which were either not copyrighted or not copyrightable. A basic premise of the decree, however—unchallenged at the trial level—was that the persons with whom KLIX had contracted for supplying such programs were the lawful owners of the broadcast rights in them.

The Ninth Circuit reversed the judgment of the District Court and held (1) that programs which were not copyrighted or not copyrightable, as well as programs upon which the copyright has expired, are necessarily in the public domain and that, therefore, are unprotectible by state law;[18] (2) the traditional torts, specifically, tortious interference with economic advantages arising out of contracts and the related aspect of the doctrine of unfair competition, may not be applied by a state where the subject matter consists of copyrighted materials;[19] (3) notwithstanding the provisions of 17 U.S.C.A. Sec. 2, common law remedies are not applicable to television programs which are either not copyrighted or not copyrightable,[20] and

(18) 335 F(2d) 350.

(19) The Ninth Circuit expressed the view that Petitioner's sole remedy was a derivative infringement action, and its opinion effectively remands the cause to the trial court to permit the Petitioner to amend its pleading to assert such a remedy.

(20) While the Circuit said it recognized that state actions based on common law copyright survive Sears and Compco (335F (2d) 350), it remanded the case for the limited purpose of enabling Petitioner to amend its counterclaim to assert a derivative action for statutory infringement (335 F(2d) 313-314).

(4) anything which cannot be copyrighted under the copyright statute is in the public domain, and an injunction upon the grounds of either tortious interference or unfair competition based on state common law invades a federally pre-empted field. The Circuit's decision is based upon the theory that *Sears* and *Compco*, decided by this court on March 31, 1964, after the decision of the District Court, are dispositive.

Petitioner respectfully suggests and represents that the precise questions involved in *Sears* and *Compco* are not applicable in the instant case and that the public policy and constitutional issues involved here are outside their ambit.

VI. FEDERAL JURISDICTION BELOW.

The Respondent herein, plaintiffs below, invoked the jurisdiction of the District Court by filing a complaint against the defendants pursuant to the provisions of 15 U.S.C.A. Secs. 1, 2, 15 and 26.(21) Jurisdiction was under 28 U.S.C.A. Sec. 1331. Petitioner's counterclaim asserts that Respondents are guilty of tortious interfence with the business and economic relationships arising under contracts between Petitioner and various program suppliers, and Respondents are also guilty of unfair competition.(22) The counterclaim of Petitioner was found to be compulsory within the meaning of Rule 13(g), Federal Rules of Civil Procedure.(23)

(21) R. 6; see 211 F. Supp. at 50, note 2.
(22) R. 29, et seq., 211 F. Supp. 50.
(23) R. 689, Finding No. 1; 211 F. Supp. at 50, note 2. The Circuit does not disturb this conclusion. At no time did Petitioner claim to be entitled to maintain an action for copyright infringement or attempt to invoke jurisdiction on that ground.

VII. REASONS FOR ALLOWING THE WRIT.

A. The Circuit Court decided the following substantial federal questions:

1. State law applying the traditional doctrine of tortious interference with contractual relationships is not applicable where the subject matter consists of copyrighted material.

2. Uncopyrighted material and uncopyrightable materials necessarily are in the public domain, and therefore cannot be protected under state law.

3. State laws and state remedies are not applicable to television programs which are either not copyrighted or not copyrightable, regardless of the program material, and notwithstanding the provisions of 17 U.S.C.A. Sec. 2.

The first question is of extreme importance to the entire broadcast industry and has not been squarely decided by this court. The Circuit's ruling conflicts with applicable rulings of this court on the second and third questions.

B. The decision of the Circuit in the instant case conflicts with decisions of at least four other circuit courts of appeal upon one or more of the points involved.

C. The Circuit Court erred in holding that the composite theory of *Sears* and *Compco* was dispositive of the issues involved in the instant case.

D. The Circuit adopted a theory of federal preemption which conflicts with prior applicable decisions of this court.

E. The rule adopted by the Circuit effectively denied application of the provisions of Title 17, U.S.C.A. Sec. 2.

ARGUMENT

POINT I.

THE CIRCUIT'S DECISION IS INCONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

A. Sears and Compco are not dispositive. There state protection would have conflicted with an affirmative federal policy denying exclusivity status because the articles lacked sufficient novelty to satisfy the federal requirement; whereas here, the question of novelty or creativity is not in issue.

To appreciate the import of the Ninth Circuit decision, it is necessary to place the case into context. Petitioner does not assert and has not asserted at any time in this proceeding that any protection was applicable under state law to programs upon which a statutory copyright has expired. This is not a case like *Ricordi & Co. v. Haendler* (CCA 2, 1952), 194 F(2d) 914, or *Singer Mfg. Co. v. June Mfg. Co.* (1895), 163 U.S. 169, 41 L.Ed. 118, 16 S. Ct. 1002, or *Kellogg Co. v. National Biscuit Co.* (1938) 305 U.S. 111, 83 L.Ed., 73, S. Ct. 109, where the granting of relief under state law would result in the extension of a federally created monopoly beyond the term permitted under federal policy. Nor is it a case involving the *de minimus* doctrine where material sought to be copyrighted lacked even the modest requirements of creativity or significant rearrangement requisite to copyright status. Cf.

Brief English System v. Owen (CCA 2, 1931) 48 F(2d) 555; *Warner Bros. Pictures, Inc. v. Majestic Pictures Corp.* (CCA 2, 1934) 70 F(2d) 310 and authorities at 310; *Barnes v. Miner* (C. Ct. N.Y. 1903) 122 Fed. 480.(24)

Petitioner concedes *arguendo* that *Sears* and *Compco* would apply to programs as to which a copyright had expired or which lacked the literary qualities requisite to the protection afforded to statutory copyrights or their common law counterparts protected under 17 U.S.C.A. Sec. 2. No pleading suggested at the trial level that there was any defense concerning any programs in this category. Respondents' only open court witness admitted upon cross-examination that the industry practice was that program suppliers obtained by contract from the copyright owners or other persons the broadcasting rights to programs and that stations were licensed to use such programs in their respective markets.(25) If there was a defense to the effect that any particular program was in the public domain, such defense should have been pleaded or it is waived. (Rule 12(h) Rules of Civil Procedure). cf *West Publishing Co. v. Lawyer's Cooperative Pub. Co.* (CCA 2, 1897) 79 Fed. 756. The validity of a copyright cannot be raised for the first time on appeal. *Davilla v. Brunswick-Balke Collendar Co.* (CCA 2, 1939) 94 F(2d) 567, cert.

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(24) It must be noted, however, that novelty requirements for copyright are substantially less than for patents. Rushton v. Vitale (CCA 2, 1955) 218 F(2d) 434; Alfred Bell & Co. v. Catalda Fine Arts (CCA 2, 1951) 19 F(2d) 99; cf. Mazer v. Stein (1953) 347 U.S. 201, 98 L.Ed. 630, 74 S. Ct. 460, reh. d. 347 U.S. 949, 98 L.Ed. 1096, 74 S. Ct. 637. It seems doubtful that any television program satisfying a sponsor would fall into the de minimus category.

(25) Testimony of Rodney Erickson, Vol. 2 of transcript, pp. 236, 239.

d. 304 U.S. 572, 82 L.Ed. 1536, 58 S. Ct. 1040; *Johns Printing Co. v. Paull's Music Corp.* 9 CCA 8, 1939) 102 F(2d) 282. The Ninth Circuit's ruling cannot be justified upon any theory to the effect that some isolated program subject to a contract with Petitioner had lost protectible status.

The sweeping rule announced by the Ninth Circuit is that no uncopyrightable or uncopyrighted program may be protected under state law, even though the affirmative policies withholding monopoly status which were present in *Sears, Compco, Ricordi, Kellogg* and *Singer* are absent. The theory of the Ninth Circuit is that a state may protect *no* program without regard to whether there is any affirmative federal policy precluding such protection, the only protection being under the Copyright Act.

Petitioner respectfully suggests that a valid distinction exists between the *Sears* and *Compco* facts and the instant case. There is an affirmative federal policy denying monopoly status to products which lack a certain standard of creativity and novelty. There is no federal policy which denies protection to an economically valuable intangible right simply because the business interest is of such a nature that a copy of it cannot be deposited with the copyright office. In other words, there is a large class of situations where economically valuable interests are protectible under state law applying traditional common law concepts. Some of those situations involve interests which are not protectible under *Sears* and *Compco* because protection collides with an affirmative federal policy. But it does

not follow that all uncopyrighted or uncopyrightable values are denied the benefits of state law simply because a limited number which run afoul of federal policy are tainted.

B. The Circuit's holding that state protection of uncopyrighted material necessarily conflicts with federal policy is in direct opposition to the holding of this court in INS v. Associated Press (1918) 248 U.S. 215, 63 L.Ed. 211, 39 S. Ct. 68, 2 ALR 293.(26) Either INS must be overruled or the Circuit was wrong.

In the instant case, the Ninth Circuit announced the following broad rule:

> " . . . that which is either not copyrighted [or] not copyrightable is in the public domain . . . When an article is unprotected by patent or copyright, state law may not forbid a person not the originator to merely copy and commercially exploit that article, for such a law would enable the originator to accomplish with the left hand of state authority what he was unable to accomplish with the right hand bearing the authority of the primary federal interest." 335 F(2d) at 350.

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(26) Even prior to INS. v. Associated Press, this court held that intangible economic interests which could not be copyrighted because of the nature of the interests involved were, nevertheless protectible under the law. Chicago Board of Trade v. Christie G & S Co. (1904) 198 U.S. 236, 49 L. Ed. 1031, 25 S. Ct. 637; Hunt v. N. Y. Cotton Exchange (1906) 205 U.S. 322, 51 L. Ed. 821, 27 S. Ct. 529. Other instances where uncopyrightable values were protected under traditional tort theories appear in the dissent of Mr. Justice Brandeis in INS. A subsequent case is Moore v. N. Y. Cotton Exchange (1925) 270 U.S. 593, 70 L. Ed. 750, 46 S. Ct. 367, 45 ALR 1320. The range and extent of cases granting protection under a traditional common law theory or a state statute involving the so-called right to privacy is not considered here. Under the Ninth Circuit's theory, all intangible, uncopyrighted values heretofore protected as property are extinct.

This holding obliterates the settled rule of *INS v. Associated Press* and extends the ruling of *Sears* and *Compco* beyond the factual situations there presented.

A detailed analysis of *INS* is beyond the scope of this Petition. In general, its holding was characterized by this court in *Schecter v. U. S.* (1935) 295 U.S. 495, 79 L. Ed. 1570, 55 S. Ct. 837, 97 ALR 947:

> "In recent years [the scope of the unfair competition doctrine] has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own — to misappropriation of what equitably belong to a competitor. International News Service v. Associated Press."

Notwithstanding the plethora of comment and criticism to which it has been subjected for nearly 50 years, the teachings of *INS* have permeated the entire modern law of unfair competition and unfair trade practices. That palming off was not the basis for the decision is clearly apparent from the Brandeis dissent from which the Ninth Circuit quoted generously in the instant case. That *INS* has never been reversed by this court is undeniable; that *INS* held unequivocably that intangible economic interests which cannot be copyrighted are, nevertheless, subject to judicial protection cannot be controverted. Most, if not all, of the hundreds of state and federal cases which protect as property an intangible but uncopyrightable business interest following the *INS* rule would be discarded by the Ninth Circuit's broad theory that no uncopyrightable or uncopyrighted article can be protected under state law.

The parties and the United States as amicus in

Sears and *Compco* did not urge, in those cases, the adoption of so broad a rule. It is submitted that Judge Sweigert's decree would have survived the arguments of the parties in those cases. The brief for Sears, for example, made clear that it did not contend that state law was inapplicable in ordinary unfair competition situations:

> "In order best to preface the position of Sears in this case, it may be helpful to consider first what Sears does not contend. Sears does not contend that this Court should change the local law of the State of Illinois relating to unfair competition, although that law as construed by the Court of Appeals for the Seventh Circuit is not in accord with the applicaton of the local law of unfair competition of other states by the federal courts of other Circuits. Sears does not contend that the federal courts, in cases involving issues not subject to a controlling federal statute or policy, cannot enjoin acts of unfair competition in violation of the law.(8)
>
> 8 The rights which are secured to inventors under the Constitution of the United States and the federal patent statutes must be enjoyed in subordination to the general authority of the individual states over all property within their limits. For example, a state statute may restrict the use or practice of a patented invention, Patterson v. Kentucky, 97 U.S. 501 (1879), a state may prescribe reasonable regulations for the transfer of patent rights, Allen v. Riley, 203 U. S. 327 (1906); and royalties received from patents are subject to non-discriminating state income taxes, Fox Film Corp. v. Royal, 286 U.S. 123 (1932)."(27)

(27) Petitioner's brief, Sears, Roebuck v. Stiffel, pp. 12-13. Docket 108 this court, October 1963 term.

Sears argued simply that in the particular case there was a collision between the federal and the state laws and that the state law must yield.(28) Sears pointed out that "The inventor makes his dedication to the public at the time his patent is published on the date of its grant."(29) Since the patent was invalid under the federal statute, the state law could not grant a greater monopoly than would have been granted had it been valid.(30)

The brief of the United States in both cases made the same point. The cases cited and arguments made by the Solicitor General were directed to the proposition that state law which *conflicts* with an affirmative federal monopoly policy, either in patent or copyright law, must give way to the extent that there is a conflict. The point is summarized as follows:

> "We are not suggesting that a State never could grant protection against systematic 'pirating' of original designs or creations, or against unauthorized reproduction of a recorded performance of a literary or musical work. See supra, p. 11. The present cases, however, involve the copying of unpatented articles, the distinguishing characteristics of which are functional. To permit State law to prohibit such copying would contravene the federal policy that only a patent may confer the right to prevent all others from producing such a product."(31)

The application of unfair competition concepts in

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(28) Ibid, p. 16.
(29) Id. p. 17.
(30) Id. pp. 19-20.
(31) Brief of United States as amicus curiae, Compco Corp. v. Day Brite, and Sears, Roebuck v. Stiffel, p. 28. Docket 106, 108, this court, October 1963 term.

their traditional role, and insofar as they did not conflict with federal policy, was not objectionable.(32)

Petitioner respectfully suggests that the distinctions carefully observed by the parties and this court in *Compco* and *Sears* were ignored by the Circuit in the instant case. No federal policy precludes protection of the economic interests inherent in live television programs. They are not copyrightable because of the mechanical requirement of the Act, not for lack of ability to satisfy a federal qualitative standard. No federal statute reaches them. If they are not protectible by the states, applying traditional tort doctrines, any interloper using any one of a number of available electronic devices can usurp with impunity the values in entertainment which heretofore have been protected. In *INS* it was argued that the Associated Press should not be granted a monopoly which conflicted with the copyright monopoly under the federal statute. The court held that the decree did not have that effect. It stated:

> "[Complainant was not given] the right to monopolize either the gathering or distribution of news; or, without complying with the Copyright Act, to prevent the reproduction of its news articles; but [the decree] only postpones participation by complainant's competitor in the processes of distribution and reproduction of

(32) Ibid, pp. 31-32. The amicus brief expressly suggested that the kinds of questions involved in the instant case be set aside in Sears and Compco, p. 11, notes 2 and 3. " . . . the policy consideration involved in the resolutions of those issues may be different than those in the present cases, and the problems of federalism posed may call for a different balancing of federal and state interests." Id. p. 13. INS; Capitol Records (discussed in Point III of the argument, p 36; Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433, 194 Atl. 631, which was relied upon by the Third Circuit in Ettore (discussed in Point III, p. 38, were cited by the United States in notes 2 and 3, p. 11, id. These cases involved uncopyrightable interests.

> news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant, and in violation of the principle that underlies the maxim 'sic utere tou', etc."

Thus, except for the narrow class of situations involved in *Compco* and *Sears*, this court has ruled that protection of an uncopyrighted interest does not conflict with federal policy.

Judge Sweigert's decree in the instant case carefully observed the indicated safeguards. The decree does not extend the term of any copyright nor does it prevent the reproduction of an uncopyrightable event such as news. It does, however, effectively postpone the use of Petitioner's stock in trade, to-wit: the programs licensed to it by program suppliers, to the extent required to prevent Respondents from reaping where they have not sown.[33]

The significance of the Circuit's ruling becomes apparent upon consideration of the problems inherent in the television industry. A television program which is released simultaneously with the occurrence of the telecasted event is beyond the reach of the copyright statute. Copies of the actual live telecast cannot be filed with the copyright office prior to the time when the expected economic benefits are available to producers and other entrepreneurs who combine the ingredients

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(32) Conclusion of Law No. 8, R. 705, 706; Decree, para. 2, R. 710, 711. The effect of the decree is to prohibit Respondents from releasing on their CATV system the programs licensed to Petitioner prior to or simultaneously with their broadcast by Petitioner.

making television viewing possible.(34) A network telecast of a World Series baseball game, for example, is not copyrightable for the same reasons that news was held to be not copyrightable in *INS*. All network programs released simultaneously with their production are similarly situated with respect to the application of the copyright statute and fall into the same category. From an economic standpoint, uncopyrightable programs are the most valued in the industry.(35)

The Ninth Circuit decision adopts the dissenting view of Mr. Justice Brandeis rather than the view of the majority of the court in *INS*. (335 F(2d) 352-353). It's attempts to distinguish the case are totally unconvincing. The programs in this category are not copyrightable for the same reason that news was held not subject to copyright. The evidence showed that Respondents in the instant case actually advertised to prospective subscribers that they were bringing the programs in question to Twin Falls.(36) Thus there is at least as much implied misrepresentation in the instant case as in *INS*. The Circuit said that in *INS* the action was brought by an originator and here by an exclusive

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(34) No analysis is required of the various interests heretofore protected in live television programs, i.e., the individual rights of promoters, participants, advertisers, networks and stations. The blanket holding whereby anything not copyrighted or not copyrightable is not protectible by a state places all those interests in the same category as far as the Constitutional question is concerned.

(35) It is common knowledge that such programs as the World Series games, the college and professional football games, the New Year's Day games and the Sunday night variety shows on the networks, for example, attract the advertisers most able and willing to pay premium prices for exposure of their products.

(36) See note 12, supra. The ads say "Cable Vision brings you . . . [the popular shows]". The evidence showed that Respondent Cable Vision moved stations off and on the cable at its sole discretion, Finding No. 15, R. 696, 697.

licensee, but the question is whether the program content is protectible, not who has the right to bring the action. Aside from that consideration, there is nothing in the *INS* decision from which the Circuit is justified in inferring that an action for a traditional tort, separate and distinct from copyright infringement, may not be brought by an exclusive licensee. In substance and effect, the Circuit deliberately chose to lean upon the view of the dissenting Justice in *INS* rather than to apply the settled rule of that case to the facts found by the District Judge.

Of no less significance is the fact that the Circuit did not and could not bridge the gap between the holding of the majority of the court in *INS* to the effect that certain economic interests, although not copyrightable, are subject to judicial protection, and the holding of this court in *Compco* and *Sears* that material which is in the public domain cannot be protected under state law. Perhaps television programs do not attain the elite status of those " . . . noblest of human productions—knowledge, truths ascertained, conceptions and ideas— . . . " which Mr. Justice Brandeis said became free as the air to common use after communication. But it is just as reasonable to say that a ticket to a World Series baseball game is in the public domain as to say that the right to the telecast of a World Series game in Twin Falls, Idaho is in the public domain. Live television programs are not in the public domain. The Circuit's characterization of Petitioner's contracts for the use of exclusive television programs as a "bootstrap" is an inept and inaccurate characterization of the transaction.

If the majority view in *INS* cannot be applied by the states on the grounds urged by the dissenting opinion in that case, namely that the subject is preempted by the Copyright Law, this court should take the opportunity of so ruling. The holding of the Ninth Circuit squarely presents the problem.

C. The court erred in holding that state protection of uncopyrighted program material conflicts with federal policy.

The Ninth Circuit held that all uncopyrighted television programs are in the public domain and that state protection conflicted with the policy of the Copyright Act.[37]

Section 2, 17 U.S.C.A. is explicit that common law or equity rules are applicable to prevent the copying, publication or use of an unpublished work. An author or proprietor of a literary work may, if he chooses, refrain from publishing the work and maintain a perpetual monopoly in it.[38] *Bobbs-Merrill Co. v. Straus* (CCA 2, 1908, 167 Fed. 15, 18-19, aff. (1910) 210 U.S. 339, 52 L.Ed. 1086, 28 S. Ct. 1086. *Warner Bros. Pictures v. Columbia Broadcasting System* (D.C. Cal. 1951) 102 F.Supp. 141. This court said, affirming *Bobbs-Merrill v. Straus, supra*, that:

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(37) 335 F(2d) at 350.

(38) It is submitted that the composite doctrine of Sears and Compco cannot be applied to programs subject to the provisions of 17 USCA Sec. 2. By definition, such programs are not in the public domain. Edgar H. Woods Associates, Inc. v. Skene and Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc., referred to in the text, infra, which the Circuit purports to approve, are actually contrary to the Circuit's holding on this point.

> "The [common law and statutory] rights do not co-exist in the same composition; when the statutory right begins the common law right ends."

It seems obvious that if the statutory right never begins, the state remedy must be applicable to protect the pre-existing common law right. *Wheaton v. Peters* (1834), 33 L. Ed. U.S. 591, (8 Pet.) 1005. The Congress has explicitly provided, in Section 2 of the Act, that as to unpublished works, common law remedies survive. *Erie R. Co. v. Tompkins* (1937), 304 U.S. 64, 82 L.Ed. 1188, 58 S. Ct. 817, requires the application of state law with respect to such rights as are protected under Section 2 of the statute. *Wheaton v. Peters*, supra.

The broadcast of a television program which is not or cannot be copyrighted under the Act does not constitute publication. *Ferris v. Frohman* (1911) 223 U.S. 424, 56 L.Ed. 492, 32 S. Ct. 263; *American Tobacco Co. v. Werckmeister* (1907) 207 U.S. 284, 52 L.Ed 208, 28 S. Ct. 77; *Nutt v. National Institute* (CCA 2, 1929) 31 F(2d) 236; *Uproar Co. v. National Broadcasting Co.* (D.C. Mass. 1934) 8 F.Supp. 358; modified as affirmed (CCA 1, 1936) 81 F(2d) 373; cert. d. 298 U.S. 670, 80 L. Ed. 1393, 56 S. Ct. 835. *Capitol Records v. Mercury Records* (CCA 2, 1955) 221 F(2d) 657, is bottomed upon the premise that broadcast does not constitute publication. The rule was assumed to be sound in *RCA Mfg Co. v. Whiteman* (CCA 2, 1940) 114 F(2d) 86, but the case was decided upon another point.(39) The proprietors of such

(39) The rule that the broadcast of copyrighted material does not constitute abandonment of rights of the proprietor is estab-

programs therefore have a protectible interest subsequent to the teleacast. *A fortiori* their interest is protectible against instantaneous piracy. See *Metropolitan Opera Association v. Wagner-Nichols Record* Corp. (1950) 199 Misc. 786, 101 NYS(2d) 483, aff. (1951) 279 App. Div. 632, 107 NYS(2d) 795.

In *Sears*, upon which the Circuit purported to rely in the instant case, this court expressly recognized the applicability of Section 2 of the copyright statute to unpublished works. It is true that the Ninth Circuit referred to Note 7 in the *Sears* case and the Circuit purports to approve the holding in *Edgar H. Woods Associates, Inc. v. Skene* (Mass. 1964) 197 NE(2d) 886, and *Columbia Broadcasting System, Inc. v. Documentaries, Inc.* (1964) 42 Misc. (2d) 723, 248 NYS(2d) 809, both decided after *Sears* and *Compco*. At the same time, the Ninth Circuit unequivocably holds that anything which is not copyrighted is in the public domain and when an article "is unprotected by . . . copyright, state law may not forbid a person not the originator to merely copy and commercially exploit that article . . . " Moreover, the Circuit did not remand the case for a factual determination as to the programs which were not copyrighted and unpublished so that state remedies could be applied at least to them. It held instead that no state remedy was applicable; that the only remedy was a derivative one for copyright infringement. This, notwithstanding that programs in this category—

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lished by Buck v. Jewel LaSalle Realty Co. (1931) 283 U.S. 191, 75 L.Ed. 971, 51 S. Ct. 410, and Society of European SAAC v. New York Hotel Statler Co. (S.D.N.Y. 1937) 191 F. Supp. 1; Law v. National Broadcasting Co. (S.D.N.Y. 1943) 51 F. Supp. 289; Harms v. Sansom House Entertainment, Inc. (F. C. Pa. 1958) 162 F. Supp. 129, aff. sub. nom. Leo Feist, Inc. v. Lew Tendler Tavern, Inc. (CCA 3, 1959) 257 F(2d) 494.

on the Circuit's own theory—are not subject to protection under the Act.

Petitioner respectfully submits that the failure of the Circuit to observe appropriate respect for 17 U.S.C.A. Sec. 2 deserves review by this court even without the serious and far-reaching implications of the other aspects of the decision discussed elsewhere in this Petition.

D. The holding that a statutory infringment action is the sole remedy conflicts with 17 U.S.C.A. Sec. 2 where the program material is not copyrighted or not copyrightable.

As indicated under pargraph C, supra, the Ninth Circuit acknowledged the existence of Section 2 of the Act and this court's recognition of its provisions in *Sears* (376 U.S. 231,, Note 7). And the court obviously recognized that the lower court's decree would apply to prohibit interference with Petitioner's use of non-copyrighted programs. However, the court's decision remanded the case to the District Court to require that Petitioner amend its counterclaim to assert a derivative statutory action for copyright infringement. The Ninth Circuit decision denies the application of the state law of tortious interference and unfair competition even to programs which are not copyrighted and not published and which are therefore subject to the provisions of Section 2 of the statute.

The federal remedies under the copyright statute are not applicable to television programs which are not copyrighted or not copyrightable. Their protection must be, of necessity, under state law. The District

Judge held that the state law of Idaho applying the traditional torts of interference with contractual relationships and unfair competition were applicable to justify the injunction against defendant's conduct.

If state remedies are not applicable to programs which are to be protected pursuant to common law under Section 2 of the Act, there is no available remedy for programs in this category. The federal remedy applies only to copyrighted programs. Federal courts do not have jurisdiction under the Copyright Act to issue a decree enjoining the exploitation of programs which are not copyrighted. The decisions of the Ninth Circuit on this point, therefore, is totally unrealistic and inconsistent with the explicit provisions of 17 U.S.C.A. Sec. 2.

POINT II.

THE CIRCUIT RULED THAT THE TRADITIONAL DOCTRINE OF TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONSHIPS MAY NOT BE APPLIED UNDER STATE LAW WHERE THE SUBECT MATTER OF THE CONTRACT CONSISTS OF COPYRIGHTED MATERIAL. THIS QUESTION IS OF URGENT NATIONAL CONCERN AND HAS NOT BEEN HERETOFORE DECIDED BY THIS COURT. (40).

A. A copyright is, of course, a limited federal monopoly and constitutes a new right which was unknown at common law. *Wheaton v. Peters*, supra. Copy-

(40) If state law may be applied to uncopyrighted and uncopyrightable programs, obviously the doctrine of tortious interference may be applied to contracts whose subject is such programs.

right infringement is a separate and distinct tort, the only remedy for which is a statutory action for infringement. *Globe Newspaper Co. v. Walker* (1908) 210 U.S. 356, 52 L.Ed. 1096, 28 S. Ct. 726.

Petitioner does not contend and never has contended in this case that it can maintain a statutory suit for copyright infringement action without joining as parties the owners of the copyright. This is not a suit for copyright infringement.[41] Jurisdiction of the District Court in the first instance was invoked by the Respondent's own complaint on a theory unrelated to copyright, and the court obtained jurisdiction of Petitioner's counterclaim by reason of Rule 13(g), Federal Rules of Civil Procedure. *Moore v. N. Y. Cotton Exchange* (1925) 270 U.S. 593, 70 L.Ed. 750, 46 S. Ct. 367, 45 ALR 1320. Petitioner alleged, and the trial court determined, that the Petitioner had obtained by contract certain exclusive rights to television programs in Twin Falls, Idaho, and that defendants' conduct constituted tortious interference with those rights under the laws of the state. The trial court found that some of these programs were copyrighted. Finding No. 8, R. 692. That finding is not disturbed by the Circuit. The Circuit held that since the subject of the contracts was copyrighted materials, the state law was inapplicable. Its opinion remands the case to enable Petitioner to assert a derivative copyright remedy (335 F.(2d) 353, 354). Thus the question is presented squarely as to whether a state is precluded from applying

(41) The Circuit's suggestion that the decree " . . . redeems what are in essence copyright interests" is gratuitous. The decree has no effect upon the relationships between the copyright proprietors and Respondents inter se.

its law of tortious interference with contracts simply because the subject matter of the contracts consists of copyrighted material.

Petitioner alleges that this court has never passed upon the precise question involved. Counsel has been unable to locate such a case and no such case is cited by the Circuit. A number of lower courts and state cases which reach the opposite result from that of the Ninth Circuit in the instant case are discussed in Point III of this Petition.

Petitioner asserts that the remedy which was applied by the District Court does not affect in any manner the right of the copyright owner to maintain a separate suit for infringement. If, as the Circuit suggests, Respondent's conduct also renders them liable for statutory infringement of copyright, they are not thereby relieved of liability of separate and distinct state torts. The imposition of liability to Petitioner for the commission of tortious interference does not in any manner conflict with the federal policy, which justifies the imposition of liability to the copyright owner for the federal tort. Granting of relief by the state does not enlarge the scope or the term of the federal monopoly. State relief does not constitute the recognition of any new monopoly or any new right; it simply enjoins the commission of a separate and distinct legal wrong which has no connection whatever with the policy of the United Stats except the coincidence that the subject matter of the contract is a limited monopoly protected by federal law.

This court held in *Becher v. Contoure Laboratories*

(1928) 279 U.S. 388, 73 L.Ed. 752, 49 S. Ct. 356, that state courts have jurisdiction to establish a trust malificio in letters patent and to require the patentee to assign such letters to the maker of the patented invention and to enjoin the patentee from using, manufacturing or selling the patented articles or transferring any rights under the patent. The court said:

> "It is not denied that the jurisdiction of the courts of the United States is exclusive in the case of suits arising under the patent laws, but it was held below that the suit in the state court did not arise under those laws. It is plain that that suit had for its cause of action the breach of a contract or wrongful disregard of confidential relations, both matters independent of the patent law, and that the subject matter of Oppenheimer's claim was an undisclosed invention which did not need a patent to protect it from disclosure by breach of trust."

The state court was held to have jurisdiction to determine the question presented whether or not the invention was patented.

The same principle was applied by this court in *Radio Station WOW v. Johnson* (1944) 326 U.S. 120, 89 L.Ed 2092, 65 S. Ct. 1475, where a state court required that a lease of a radio station be set aside and that the assets be returned to the plaintiff. The station was operated by authority of a license granted by the Federal Communications Commission and it was contended that the state court's decree was inconsistent with the proper regard for the federal policy which had conferred the broadcasting monopoly upon the plaintiff. The court said:

> "We have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the Society to WOW and upon finding fraud to direct a reconveyance of the lease to the Society. And this, even though the property consists of licensed facilities and the Society chooses not to apply for retransfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of a broadcasting station. The Communications Act does not explicitly deal with this problem, and we find nothing in its interstices that dislodges the power of the States to deal with fraud merely because licensed facilities are involved. The 'public interest' with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of States in enforcing their laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud . . ."

This court has held that a state may validly restrict the use or practice of a patented invention. *Patterson v. Kentucky* (1879) 97 U.S. 501, 24 L.Ed. 1115; and that royalties received from copyrights are subject to non-discriminatory state taxes. *Fox Film Corp. v. Doyal* (1932) 286 U.S. 123, 76 L.Ed. 1010, 52 S. Ct. 546. In *New Marshall Engine Co. v. Marshall Engine Co.* (1911) 223 U.S. 473, 56 L.Ed. 513, 32 S. Ct. 238, this court held that a state court may try questions of title to a patent, construe and enforce contracts relating to patent, and specifically enforce assignment agreements, even where the decree enjoined defendants from manufacturing or selling the patented machine. State courts even have power to determine

that a patent is invalid where such invalidity is urged as a defense in a suit on a contract. *Pratt v. Power Light and Coke Company* (1897) 168 U.S. 255, 42 L.Ed. 458, 18 S. Ct. 62; *Becher v. Contoure Laboratories, supra; MacGregor v. Westinghouse Electric and Mfg. Co.* (1947) 329 U.S. 402, 91 L.Ed. 380, 67 S. Ct. 421. Indeed, it has been held generally that, except for the application of remedies incident to the specific sort of statutory infringement, state courts have jurisdiction and state remedies are applicable to determine all questions involving copyrights and to apply general contract and tort principles. *Parissi v. General Electric Co.* (N.D. N.Y. 1951) 97 F. Supp. 333; *Muse v. Mellin* (S.D.N.Y. 1962) 212 F.Supp. 315 and authorities cited. Thus a state and not a federal court has jurisdiction to foreclose a mortgage on a copyright. *Republic Pictures v. Security First National Bank* (CCA 9, 1952) 197 F(2d) 767, and patents, copyrights or trademarks transferred in fraud of creditors may be reached by an action in the state court. See cases cited 37 CJS p. 869; Fradulent Conveyances, Sec. 22.

The tort of interference with contractual relationships developed in factual situations where the tortfeasor was guilty of the commission of other torts or crimes as an incident to the unlawful interference. See comments (b) and (h) to the Restatement on Torts, Sec. 766. In a tortious interference case, plaintiff is more concerned with the result than the means whereby a defendant achieved it. The more predatory the conduct, the less likely there is a defense to the common law tort. Ibid. 4 Restatement on Torts, p. 53. Suppose,

however, instead of being guilty of infringement, as the Circuit indicates, Respondents had jammed the signal transmitted by Petitioner at the time Petitioner was telecasting the programs subject to its contracts. Would anyone deny that Petitioner had a state remedy for tortious interference, even though there was no federal action for infringement? Suppose Respondents had prevented Petitioner from enjoying the benefits of its contracts by systematically intercepting prints of copyrighted films. No one would deny that a state remedy existed for tortious interference, even though the conduct did not constitute grounds for an infringement action. Both of these hypothetical situations demonstrate conclusively that the commission of the federal tort of infringement invades a separate and distinct interest than the commission of the tort of unlawful interference as found by the trial judge. That the conduct constituting a federal tort constitutes all or part of the means whereby the state tort is created does not protect against liability for the latter. Instead it emphasizes the predatory nature of conduct which gives rise to liability for the distinct wrong.

It is submitted that the Circuit's ruling does not conform to the views expressed by this court in analogous situations and since this court has not ruled upon the precise question, it should review the Circuit's decision.

B. This question has substantial significance to the entire broadcast industry and to large parts of the entertainment business. In many instances television networks themselves do not own copyrights on programs which they telecast. The telecasting rights are acquired

by contract from advertisers, agencies, motion picture producers, film syndicators or others. The common practice in the broadcasting industry is that individual stations obtain the right to telecast copyrighted shows by contract. In most instances, the broadcaster has no direct legal relationship with the copyright owner. Moreover, the owner's practical and economic interest may be substantially different from that of the station and the copyright ownership may be fragmented to an extent rendering impracticable the maintenance of a derivative suit. The determination of the legal question involved affects widespread business and economic relationships in all phases of the entertainment world where exclusive contracts and licenses to use both copyrighted and uncopyrighted material are an integral part of day to day operation.

C. There are more than 1300 community antenna operators in the United States at the present time and predictions are to the effect that the industry is still in its infancy.(42) Many CATV operators duplicate programs of regular stations in the same manner and substantially to the same degree as the Respondents duplicate programs licensed to Petitioner in the instant case. The FCC has explicitly ruled that it does not have the power to determine legal questions where the conflicts between CATV operators and broadcasters require determination. Report and Order, Docket 12443, 18 RR 583, 27 F.C.C. No. 3, p. 23-61, 68.(43) As ob-

(42) Kroeger "CATV Revisited" Television Magazine, Sept. 1964, p. 10 et seq. New York Times, Oct. 22, 1961, Sec. III, p. 1 "Antenna Systems in TV Are Gaining."

(43) In Docket #23443, supra, the Federal Communications Commission observed that "This is not the forum in which the existence or non-existence of a private property right [involved

served by the trial court, this case is one of a series to obtain rulings upon significant basic legal problems in clashes between the two systems of communication.(44) A final ruling with respect to the matters involved in the instant case will be of inestimable value to the owners and operators of television stations and CATV systems alike where a comparable conflict exists.

POINT III

THE DECISION OF THE NINTH CIRCUIT IS INCONSISTENT WITH ITS OWN PRIOR DECISIONS AND WITH APPLICABLE DECISIONS OF AT LEAST FOUR OTHER CIRCUITS.

A. The circuits have ruled consistently that state remedies applying traditional torts doctrine are applicable to prevent piracy of uncopyrighted and uncopyrightable intangible values.

The Ninth Circuit held in the instant case that state law was not applicable to enjoin piracy of anything uncopyrightable or uncopyrighted. Such ruling is contrary to its own decision in *Associated Press v. KVOS* (CCA 1935) 80 F(2d) 575, where it affirmed a decree enjoining commercial exploitation of uncopyrightable material upon the grounds of unfair compe-

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in broadcast-CATV conflicts] can be adjudicated . . . Until the existence of such a right is determined finally, . . . we cannot appropriately consider a rule based on the assumption that it exists," at para. 38. That the Commission is of the view that public policy is served by non-duplication of the programs of a local station in a manner similar to the result achieved under Idaho law in the instant case is clear from Carter Mountain Transmission Corp. v. Federal Communications Commission (D. C. Cir. 1963) 321 F(2d) 359, cert. d. 375 U.S. 951, 11 L.Ed (2d) 312, 84 S. Ct. 442.

(44) See Note 43, and 211 F. Supp. 47. No final decree has been entered in the Intermountain case referred to in note of Judge Sweigert's opinion.

tition. The ruling conflicts with the holdings of at least three other circuits on the same point.

The First Circuit held in *Uproar Co. v. NBC* (CCA 1 1936) 81 F(2d) 373, cert. d. 298 U.S. 670, 80 L.Ed. 1392, 56 S. Ct. 835, that the decision of a District Court applying state law should be upheld (see 81 F. Supp. 358), where the court effectively enjoined interference with contractual rights and the misappropriation of rights in radio scripts. The scripts were apparently uncopyrighted but probably copyrightable. The court also approved a decree enjoining the misappropriation of the name "Graham", the rights to the name and the script both having been conferred by contract upon the Texas Company and National Broadcasting Company.

In *Capitol Records v. Mercury Records, supra*, the Second Circuit applied New York law to enjoin plagiarism of uncopyrightable phonograph records. The court said:

> "Since the Copyright Act does not deal with the protection of phonograph records of the performances of public-domain compositions by virtuosos, we have no basis for applying federal law. We must apply the court which would have been applied in the courts of the state embracing the district of the court below. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188."

The court followed the New York decision of *Metropolitan Opera Assn. v. Wagner-Nichols Recorder Corp.* (1950) 199 Misc. 786, 101 NYS (2d) 483, aff. (1951) 279 App. Div. 632, 107 NYS (2d) 795, which in turn

had followed and applied the rule of this court in *INS v. Associated Press, supra.* A majority of the court rejected the argument that state law was inapplicable because of federal pre-emption under the Copyright Act. *Capitol Records* overruled *RCA Mfg. v. Whiteman* upon which the Ninth Circuit purported to rely in the instant case. In August of this year, the Second Circuit held in *Flexitized, Inc. v. National Flexitized Corp.* (CCA 2, 1964) ....F(2d) ...., 142 U.S.P.Q. 334, that the decisions of this court in *Sears* and *Compco* did not establish a Constitutional bar to the application of state law applying unfair competition doctrines where the defendants continued to use plaintiff's trademark whose federal registration was held to be invalid. The court referred to its decision in *Maternally Yours, Inc. v. Your Maternity Shop, Inc.* (CCA 2, 1956) 234 F(2d) 538, which contains a detailed discussion concerning whether state or federal rules of unfair competition are to be applied in pendent jurisdiction cases. The court concluded that state law was applicable in diversity cases to the same extent as in instances where the federal jurisdiction was pendent. The court referred to several New York decisions as " . . . the result of doctrinal development in the wake of the United States Supreme Court's classic decision in *International News Service v. Associated Press* . . ." and held that misappropriation for commercial advantage was actionable under state law, without a showing of secondary meaning. The Second Circuit's reaffirmation of the applicability of state law is directly contrary to the theory of the Ninth Circuit in the instant case.

The Third Circuit applied state law to permit the

recovery of damages for the broadcast of a film of the prize fight between Ettore and Joe Louis in *Ettore v. Philco TV Brodacast Corp.* (CCA 3, 1956) 229 F(2d) 481, cert. d. 351 U.S. 926, 10 L.Ed. 1456, 76 S. Ct. 783. The film of a 1936 fight in Philadelphia had been broadcast on the NBC series called "Greatest Fight of the Century." Whether the film itself was copyrighted does not appear in the decision, but the case clearly holds that the plaintiff had a right which was not copyrightable and the court held that the right was protectible under the laws of the states of Pennsylvania, New Jersey, Delaware, and New York. With respect to Judge Hand's suggestion in *RCA v. Whiteman, supra,* that state law was inapplicable because the federal Copyright Act had pre-empted the field, the court commented:

> "The ghost of Swift v. Tyson [16 Peter 1, 41 U.S. 1, Chem. L.Ed. 865] tunes again his lyre." Note 16 at p. 494.

As the trial judge in the instant case aptly observed, broadcasting rights in television programs have frequently been protected by state courts and lower federal courts. *Pittsburgh Athletic Club v. KQV Broadcasting Co.* (W. D. Pa. 1938) 24 F. Supp. 490; *Veatch v. Wagner,* 116 F. Supp. 904; *Mutual Broadcasting System v. MUZAC Corp.* (1941) 177 Misc. 489, 30 NYS(2d) 419; *Twentieth Century Sporting Club v. Trans-Radio Press Service* (1937) 167 Misc. 71, 30 NYS 159; *National Exhibition Co. v. Fass* (1954) 133 NYS (2d) 379, aff. 136 NYS(2d) 358; *Southwest Broadcast Co. v. Oil Center Broadcasting* (1947) 210 SW(2d) 230, and many other unreported cases dis-

cussed by Solinger, (1948) "Unauthorized Use of Television Broadcasts", 48 Columbia Law Review 848. These cases consistently apply the rule of *INS v. Associated Press* to hold that state law is applicable to protect uncopyrightable interests in the intangible values inherent in programs broadcast by radio or television. The teachings of all of these cases would be cast aside by the Ninth Circuit under the broad theory that any program material not copyrightable or not copyrighted is denied protection under state law.

B. At least one circuit and a number of district courts have held that state law applying the doctrine of tortious interference with contractual relationships and unfair competition is applicable where the subject matter is copyrighted material or patented articles.

As demonstrated in Point II of this argument, the question is presented squarely as to whether a state may apply the traditional doctrine of tortious interference with contractual relationships where the subject matter of the contract consists of copyrighted or patented articles.

At least one circuit court has ruled directly opposite to the ruling of the circuit in the instant case. In *Meyer v. Washington Times* (C.A.D.C. 1935) 76 F (2d) 988, cert. d. 295 U.S. 734, 79 L.Ed. 1682, 55 S.Ct. 646, the D. C. Circuit held that the traditional remedy, to-wit, tortious interference with contractual relationships, was applicable where the subject matter of the contracts consisted of syndicated stories and cartoons which were copyrighted. The court stated:

> "This doctrine had its inception with the case of Lumley v. Gye, 2 Ellis & Bl. 216. The doctrine of that case, which was limited to malicious interference with contracts for personal service, has been followed and extended by numerous other cases. It now extends to contracts other than those involving personal services, and the definition of 'malice' has been broadened to include unjustified interference with the contractual relationship."

The tortious interference doctrine has been applied where the subject matter of contracts consists of copyrighted materials in a number of cases in state courts. *Montgomery Enterprises v. Empire Theatre Co.* (1920) 204 Ala. 566, 86 So. 880, 19 ALR 987; *Wells v. National Exhibitors Circuit* (1919) 149 Ga. 200, 99 SE 615; *Peekskill Theatres v. Advance Theatrical Co.* (1923) 206 App. Div. 138, 200 NYS 726; *Alcazan Amusement Company v. Mudd and Cooley Amusement* Co. (1920) 204 Ala. 509, 86 So. 209.

In *New York Phonograph Co. v. Jones* (C. Ct. N. Y. 1903) 123 F. 197, an exclusive licensee for the sale of patented articles in a described geographical area brought an action to enjoin tortious interference with plaintiff's contractual rights. Defendant's argument that the licensor and co-conspirators were necessary parties was rejected. The court said:

> "In federal courts the precise question here involved has been considered. In New England Phonograph Co. v. Edison et al. (C.C. 110 Fed. 26) Judge Gray held that a bill such as this was not 'for infringement of the patents under which complainant was a licensee, but is one that seeks to restrain those who are alleged to be acting

> under the original licensor from violating the negative covenants contained in said license contract. The allegations of identity of interest among the co-defendants and of general conspiracy are too positive and clear to be ignored.' This decision was followed by Judge Wheeler in New York Phonograph Company v. National Phonograph Company (C.C.) 112 Fed. 822."

The conflict between the Ninth Circuit and the general weight of authority, including at least one circuit, justifies review.

POINT IV.

THE CIRCUIT'S DECISION ADOPTS A THEORY OF FEDERAL PRE-EMPTION WHICH CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

A. The Circuit observed that its rule assured national uniformity, whereas the trial judge would have applied the law of the individual states. (335 F.(2d) 852, note 4. Both *INS v. Associated Press* and 17 USCA Sec. 2 demonstrate, however, that the area of law concerned with protectible interests does not necessarily require absolute national uniformity. Congressional acceptance of *INS* for nearly 50 years suggests at least tacit recognition of the fact that there are certain protectible interests in the creation, organization or communication of ideas or concepts which do not lend themselves to some mechanical requirement such as filing a copy with a designated office. The dynamic growth of the television industry, in at least partial reliance on the protection of programs absent of copy-

right, as evidenced by the cases on the subject,(45) attests that uniformity is not required to satisfy the needs of the industry. Petitioner suggests that this is not a case where there can be demonstrated any intention by Congress to occupy the whole field on the ground that national uniformity is required.(46)

B. As demonstrated in Point I of the Argument, the trial court's rule violates no federal anti-monopoly policy. It neither extends the term of a copyright nor protects material which lacks the intrinsic quality requisite for protectibility under federal law. Considerations outlined in Point II of the Argument demonstrate that the federal concern has been solely to protect the status of the federally created right; every other aspect of the property created by copyright has been subject to state law. Neither the protection of live programs nor a state injunction prohibiting interference with the rights created by a contract concerning copyrights or patents, therefore, interferes with the protection by the federal government of those policies involved in copyright and patent concepts. This court has recently said:

> "In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that state statutes, otherwise valid,

(45) See supra p. 38, 39.

(46) Huron Portland Cement Co. v. Detroit (1960) 362 U.S. 440, 4 L.Ed. (2d) 852, 80 S. Ct. 813; 78 ALR(2d) 1294, where a state authorized regulation was held applicable to a federally licensed vessel even though its enforcement would require structural changes, and the existing equipment satisfied the federal requirement. The court said (at 446, U.S. Reporter): "To hold otherwise would be to ignore the teachings of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists. Savage v. Jones, 225 U.S. 501, 56 L. Ed. 500, 59 S Ct 438; Maurer v. Hamilton, 309 U.S. 598, 84 L Ed 969, 60 S Ct 726, 135 ALR 1347."

> must be upheld unless there is found 'such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field.' Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 10 L ed 248, 256, 82 S Ct 1210." *Head v. Board of Examiners* (1963) 374 U.S. 424, 10 L.Ed(2d) 983, 83 S. Ct 1759, at page 430 U. S. Reporter.

cf. *Radio Station WOW v. Johnson, supra,* and the cases cited in Point II-A.

C. The adoption of the Circuit's ruling as to both the questions discussed in Points I and II of the Argument, would result in a vast no man's land as to television programs not copyrighted or not copyrightable: " . . . state law may not forbid a person not the originator to merely copy and commercially exploit that article . . . anyone may freely and with impunity avail himself of such works to any extent he may desire and for any purpose whatever subject only to the qualification that he does not . . . deceive others in thinking the creations represent his own work." 335 F(2d) 350, 351.

The Circuit's rule results in a " . . . denial of the protection which [is] rightfully expect[ed] of Government." Opinion of Mr. Justice Brennan in *Head v. New Mexico Board of Examiners, supra,* at 447 U.S. Reporter.

D. As already demonstrated in Point I, 17 USCA Sec. 2 suggests a Congressional design to leave the recognition and enforcement of certain uncopyrightable or uncopyrighted values to the states. The FCC has adopted regulations which are calculated to permit both

national networks and individual stations from enjoying the mutual benefits derived from network affiliation agreements. *National Broadcasting Company v. United States* (1942) 319 U.S. 190, 87 L.Ed. 1344, 63 S. Ct. 997, and the FCC has effectively announced its view that public policy is served by recognition and protection of a broadcaster's exclusive rights in program material. *Carter Mountain Transmission Co. v. FCC, supra,* note 44.

While announcing a principle which would result in national uniformity therefore, the Ninth Circuit failed to conform to established guidelines established by this court with respect to the application of the federal pre-emption concept.

SUMMARY AND CONCLUSION

In Point I, Petitioner demonstrated that the Circuit erred in concluding that *Sears* and *Compco* were dispositive. From the premise that some uncopyrighted and uncopyrightable matters cannot be protected by a state, the Circuit fallaciously concluded that no such material was protectible under state law. In reaching that result the Circuit ignored the rule established by this court in *INS v. Associated Press* and what the Second Circuit described as the "doctrinal development in the wake of [that] . . . classic decision . . ." Either the Ninth Circuit was wrong or *INS* must be overruled.

The Circuit's opinion effectively denies the application of 17 US.CA. Sec. 2. Uncopyrighted televi-

sion programs can be protected only under state law. Since broadcasting does not constitute publication, proprietors of television programs in this category have a protectible interest which does not conflict with federal policy, but, instead, is precisely consistent with the Congressional mandate. State remedies are available to uncopyrighted unpublished programs.

In Point II, Petitioner demonstrated that under the Circuit's ruling, a state may not apply the traditional doctrine of tortious interference with the economic benefits conferred by contract where the subject matter of the contract is copyrighted or patented. This court has not heretofore ruled on the precise question but it has ruled on closely related aspects of federalism to the effect that a state may adjudicate all property considerations related to copyright and patents except to impose liability for the tort of infringement. Final determination of the question is important to the orderly development of copyright and patent law.

In Point III, Petitioner demonstrated that the Circuit's rulings upon the questions delineated in Points I, and II are contrary to the rulings of other Circuits on the same points and against the weight of authority.

In Point IV, Petitioner demonstrated that the Circuit's ruling is inconsistent with federal pre-emption concepts as they have been announced and applied in prior decisions of this court.

For the reasons given, Petitioner respectfully prays that a Writ of Certiorari be issued by this court to review the decision of the Ninth Circuit and that upon

such review the judgment of the Circuit be reversed and the decision of the District Court be reinstated.

RESPECTFULLY SUBMITTED this 7th day of November, 1964.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

No. 3546

CABLE VISION, INC., *et al., Plaintiffs,*

v.

KTUV, INC., THE KLIX CORPORATION, *et al, Defendants.*

Memorandum of Opinion

Reported at 211 F. Supp. 47

SWEIGERT, D.J.

BACKGROUND OF THE LITIGATION

This is one of a series of cases brought to test the rights of so-called community antenna services to pick up the broadcasts of regularly licensed television stations for commercial distribution to their subscribers.

In the first three cases of the series[1] the question presented was whether a community antenna service in Twin Falls, Idaho, could, without the consent of three network affiliate stations in Salt Lake City, Utah, each of which held contractual rebroadcast arrangements with a local Twin Falls, Idaho, station, pick up the broadcasts of the Salt Lake City stations for distribution to its community antenna subscribers in Twin Falls.

In those cases this Court held upon a motion for summary judgment that the pick up of the Salt Lake City

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[1] Intermountain Broadcasting & Television Corp. v. Idaho Microwave, et al., No. 3526; KUTV, Inc., v. Idaho Microwave, et al., No. 3527; Radio Service Corporation of Utah v. Idaho Microwave, et al., No. 3528.

broadcasts by the community antenna for such purpose did not, under the circumstances, amount to unfair competition with the Salt Lake City stations within the doctrine of *International News Service v. Associated Press*, 248 U.S. 215 (1918) and related cases. (See previous Opinion of this Court reported in *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, et al.*, 196 F. Supp. 315 (D. Idaho, 1961).

In its previous opinion this Court expressly noted that no exclusive license rights were relied upon by the Salt Lake City stations in those cases and, further, that the existence of possible exclusive license rights was not sufficiently documented in those cases to justify a determination on that ground by summary judgment.

In the present case the same community antenna operators, Cable Vision, Inc., and Microwave, Inc., defendants in the previous cases and plaintiffs in the present case, commenced this action upon anti-trust grounds against the Twin Falls station, KLIX-TV, mentioned in but not a party to the previous actions and a defendant here.

This defendant, Twin Falls Station, KLIX, has counter-claimed in this action against the community antenna operators, the plaintiffs, alleging, inter alia, that station KLIX, Twin Falls, has certain contractual exclusive rights to the first run of certain programs in the Twin Falls area and that the activities of the community antenna operators—picking up the same programs as broadcast by the Salt Lake City stations for simultaneous distribution to its Twin Falls subscribers—constitutes tortious interference with such contrac-

tual rights and, further, constitutes unfair competition under the particular circumstances here presented. Accordingly, counterclaimant, KLIX has applied for a preliminary injunction against the plaintiffs.[2]

THE FACTUAL SITUATION

A good deal of the factual background of the operations here involved is set forth in our previous opinion but it is necessary to mention some other aspects in order to differentiate this case, and the relationship of the parties here, from the previous cases.

In the first place it will be observed that the dispute here is not between Salt Lake City broadcasting stations and a Twin Falls, Idaho, community antenna service, as in the previous cases, but between KLIX, Twin Falls, the broadcaster, and the Twin Falls community antenna service.

Counterclaimant, KLIX, Twin Falls, claims certain contracts with the three national network organizations, Columbia Broadcasting Company, National Broadcasting Company, and American Broadcasting Company and also with certain film distributors, which either expressly, or impliedly in the light of a general custom and practice in the industry, grant to it the

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[2] JURISDICTION—Since this case arises under the anti-trust laws of the United States, Sections 1, 2, 15 and 26 of Title 15, U.S.C., this Court has jurisdiction under Title 28 U.S.C. Section 1331, and may, therefore, exercise its ancillary jurisdiction over defendant's counter-claim, which plaintiff's have conceded to be compulsory (R.T. 260-1), even though that counter-claim alleges no independent grounds of federal jurisdiction. Moore v. N.Y. Cotton Exchange, 270 U.S. 593 (1926).

The law of Idaho would be applicable to determine the merits of defendant's counter-claim under the rule of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), which we interpret broadly to authorize the applicability of state law to all non-federal issues regardless of the source of this Court's jurisdiction.

exclusive right of first run of network and film programs in the Twin Falls Area.[3]

As pointed out in this Court's previous opinion, the transcontinental circuits do not reach Twin Falls and for that reason KLIX-TV has arranged to obtain the consent (required by Sec. 325(a) FCA, 47 U.S.C. 325(a)) of three Salt Lake City broadcasting stations, KSL-TV, KUTV and KTVT, also affiliates of the network organizations, to pick up their Salt Lake City network broadcasts by means of the KLIX antenna outside Twin Falls for rebroadcast over KLIX to the Twin Falls television area.

KLIX, Twin Falls, cannot pick up for live rebroadcast more than one such Salt Lake City signal at a time. When KLIX selects one such Salt Lake signal from two or more simultaneous signals, KLIX must normally let the other signal or signals go, although sometimes KLIX records one of the others on video tape for a delayed rebroadcast over KLIX.

Without a community antenna facility Twin Falls area television viewers would not ordinarily be able to receive the Salt Lake City signals on their home sets. To receive these Salt Lake City signals on their home sets Twin Falls area residents would need antenna larger, stronger and more sophisticated than the usual rabbit ear or roof aerial home antenna.

Thus, without community antenna service Twin

[3] Since the claimed exclusive rights to network programs under contracts with the network organizations are primarily involved —and since the determination of the issues with respect to such claims will be determinative of the issues with respect to contracts with film suppliers, we will refer in this memorandum opinion only to the network programs until otherwise noted.

Falls area home viewers would ordinarily be restricted to whatever network program from a Salt Lake City station was being rebroadcast over KLIX, Twin Falls, at any given time.

To provide Twin Falls home viewers with a wider range of choice a community antenna service, operated in part through the facilities of plaintiffs, Cable Vision, Inc., and in part through the facilities of Microwave, Inc., a common carrier, has been established in Twin Falls.

Cable Vision, Inc., picks up the Salt Lake City signals on its own specially constructed antenna outside Twin Falls and brings the signals via the common carrier microwave facilities of co-plaintiff, Microwave, Inc., and its own cable facilities, into Twin Falls and to the home sets of such Twin Falls television viewers as are its subscribers.

The community antenna operators exercise their own judgment as to the signals and programs that will be distributed to their subscriber sets. In the course of such distribution the selected signals are demodulated and otherwise electronically treated and regenerated and in some instances converted into different channels and frequencies than those on which they have been transmitted by the originating station.

The community antenna service solicits subscribers by advertisement to the effect that the service brings them more television programs, naming the various popular ones, than they would otherwise be able to receive. At certain intervals, when the community an-

tenna service has a temporarily vacated channel on its own system, it introduces music originating from its own tapes or records. Subscribers are charged a fee of approximately $100 for an initial hook-on to the system and a recurring monthly charge of $4-5 a month. The service is admittedly commercial and its operators expect to realize a profit.

The community antenna service cable is connected to the home sets of its subscribers in such manner that the subscriber may dial directly, without need of any other antenna at all, to any of the three major network programs being broadcast from the Salt Lake City stations.

It also picks up whatever local KLIX, Twin Falls, program happens to be on the air and channels it in similar manner to the home sets of its subscribers so that they can dial, if they choose, to KLIX, Twin Falls. In that case, however, the KLIX signal is receivable on a channel different than the channel on which KLIX is actually brodacasting.

It is possible for community antenna subscribers to view KLIX on its own channel but in order to do so the subscriber would have to disconnect his community antenna service attachment and receive the local KLIX signal and program by use of rabbit ear or roof aerial antenna—such as would be used for local reception if there were no community antenna service attachment. There is, however, little occasion for this inconvenient procedure among subscribers because they are able by means of the attachment to dial directly, without any kind of home antenna, not only to any of the three Salt Lake network broadcast programs, but also to KLIX.

Twin Falls, programs as rechanneled into their sets by the service.

Basis of Station KLIX, Twin Falls, Objections

KLIX does not object to the CATV pick-up of its local KLIX signal so long as the CATV pick-up does not diminish the quality of the signal. The pick-up of the KLIX signal, as rechanneled into the home sets through the community antenna service, presents to the viewer, who chooses to dial to it, the identical KLIX, Twin Falls, programs on the air at the time, including, of course, such local commercials on behalf of Twin Falls sponsors and advertisers as KLIX inserts in and after the network programs.

KLIX does, however, object to the pick-up by the community antenna service of the Salt Lake City signals for distribution of the Salt Lake network programs to its subscriber sets simultaneously with rebroadcast by KLIX of the same network program.

Such a duplication of such network programs to community antenna subscribers enables them to choose among Salt Lake City network programs simultaneously on the air with the same network programs as rebroadcast by KLIX.

The basis of the KLIX objection to such duplication is the fact that, when the network program is viewed directly as it is broadcast from Salt Lake City, it appears to the viewer with commercials inserted, not by KLIX for its local sponsors, but by the various Salt Lake stations for their own sponsors. Station KLIX contends that this practice of the community antenna

service prevents KLIX from assuring its local sponsors and advertisers that their commercials, placed with KLIX, are being seen as they would normally be seen but for such duplication, and that KLIX is subjected to reduction of the number of its television viewers and, in turn, to loss of commercial advertising revenue.

Thus, KLIX contends, it is prevented by tortious interference and unfair competition of the community antenna from enjoying the fruits of its own contractual arrangements with the networks for the first run of network programs in the community of Twin Falls.

It is a matter of judicial notice, amply shown by the record here, that under our present national policy of free radio and television reception through a system of commercially competitive broadcasting stations, a television broadcast station, being unable to charge the public for reception of its programs, must necessarily maintain itself through revenues from sponsors willing to buy time intervals allowed before, during and after programs for commercial advertising purposes. The ability of a broadcasting station to attract and maintain such commercial advertising revenue depends upon the extent to which it can assure sponsors that its programs, and the spotted commercials presented therewith, are being viewed by the television public.

For these reasons such rights of exclusive first run as a broadcaster can validly obtain for its programs have commercial significance and value.

EXCLUSIVITY

The contractual arrangement between KLIX and the

national networks, so far as exclusivity is concerned is shown by its existing contracts and by evidence of a generally recognized trade practice. That arrangement is that KLIX, Twin Falls, is granted by the network organizations the first call in its community, i.e., Twin Falls, Idaho, the community specified in the contracts, upon the programs of the networks. In the custom of the industry, the networks preclude themselves from licensing a simultaneous broadcast of their programs by any other station in that community.

Any exculsivity agreement broader than that would be, not only in conflict with, but in violation of the national television policy as declared by the regulations of the Federal Communications Commission.

Prior to 1955 the national policy permitted agreements between networks and stations under which the networks could grant first call upon their programs within what was described as the station's "primary service area". This was found by the Federal Communications Commission to be unduly restrictive with respect to stations located in another community but within the same service area. (See. Barrow Report, p. 265 et seq., Def.'s Ex. 21).

Accordingly, the regulation of the Federal Communications Commission was changed to prohibit all contracts or arrangements between network organizations and broadcasting stations which prevent or hinder another broadcasting station in the same community from broadcasting network programs not taken by the former station or which prevents or hinders another broadcast station in a different community from broadcasting any

program of the network organization—but with the express proviso that: "This section shall not be construed to prohibit any contract arrangement or understanding between a station and a network organization pursuant to which the *station is granted the first call in its community upon the programs of the network organization.* As employed in this paragraph, the term 'community' is defined to be the community specified in the instrument of authorization as the location of the station." (Emphasis ours). (FCC, Regulations, Sec. 3.568, Subsection B).

It will be observed that the degree of exclusivity permissible under this regulation is quite limited. For example, the present national policy clearly contemplates that there will be broadcast stations licensed by the network organizations in different communities but within the same general service area whose simultaneous broadcasts of network programs may overlap both communities without violation of any valid network station exclusivity arrangement.

In the present case the record shows that network programs broadcast from network affiliate stations, not only in Salt Lake City, over 200 miles away, but in Idaho Falls, 160 miles away, and Boise, 120 miles away, can be received by means of adequate antenna in the Twin Falls area simultaneously with any KLIX, Twin Falls broadcast of the same network program.

Certainly, KLIX should not be permitted to assert any right of exclusivity against a community antenna more broadly than it could be asserted against the network organization or another broadcasting station.

Further, present national policy contemplates there may be stations licensed in the *same community* entitled to broadcast the same network programs without violation of any valid exclusivity arrangement.

Here again, KLIX should not be permitted to assert exclusivity against a community antenna service any more broadly than it could be asserted against the networks and other braodcasters.

However, to the extent that KLIX has acquired by contract with the networks the first call in its community upon their programs and to the extent that KLIX actually exercises its right of first call in its community, and to that extent only, it has a contractual exclusivity arrangement that is permissible and valid under the express provisions of the above regulation.

NATIONAL CONTROL OVER EXCLUSIVITY

It is true that this limited contractual exclusivity right asserted by KLIX in the pending case lies within a field preempted by the national government through the Federal Communications Act of 1934, Title 47, USC, Chapter 5, Secs. 151-609.

The Act was adopted for the stated purpose of regulating interstate commerce in communications by wire and by radio (which includes television) so as to make available as far as possible, to all the people of the United States, a rapid, efficient nationwide wire and radio communications service with adequate facilities through a Federal Communications Commission to execute and enforce the provisions of the Act.

Sub-Chapter III of the Act, dealing with radio and television, declares the purpose thereof to be to maintain control of the United States over all channels of interstate radio transmission and to provide for the use thereof, but not the ownership thereof, by persons for limited periods under licenses granted by federal authority, no such license to be construed to create any right beyond the terms, conditions and periods of the license. (FCA 47 USC 301).

The exercise of power by the Federal Communications Commission to regulate the extent to which network organizations may enter into so-called exclusivity arrangements with broadcasting stations has been reviewed and approved by the Supreme Court (National Braodcasting Co. v. United States, 319 U.S. 190 (1942)).

It follows that the existence, extent and validity of any exclusivity arrangement claimed by KLIX to exist between it and the network organization depends upon the extent to which such arrangement conforms to the federal policy.

In this case KLIX asserts a contractual exclusivity which is expressly permissible, valid and in conformance with present national policy.

Any property right of exclusivity which KLIX acquires under its network arrangements is not a property in the sense of ownership of any channel of television transmission nor is it a property right created by or derived from its broadcasting license. No such property right or ownership is possible under the national policy.

Any property right which KLIX acquires is one that derives from its contractual arrangement with the network organizations for a limited first call exclusivity upon the programs of the latter—a private, commercial arrangement specifically permissible by the Federal Communications Commission.

There is no claim by KLIX that any network organization has violated such grant of first call in their programs. The claim of KLIX is that third persons—the defendant community antenna operators—are unlawfully interfering with private contractual property right of KLIX and unfairly competing with it.

The question, therefore, is whether recognition of such contractual exclusivity right by a court in a diversity suit, wherein state common law is applicable, and the protection thereof by injunctive relief against the community antenna service under common law doctrines of tortious interference or unfair competition, would invade any preempted field of national jurisdiction or conflict with any phase of national policy.

Status of Community Antenna Services

If this Court, recognizing such a contractual right of exclusivity in station KLIX, protects such right by injunction pursuant to these common law doctrines against the community antenna service, the effect will be, of course, to restrict in a certain sense the opportunity of the public in the Twin Falls area to receive television broadcasts via the facilities of a commercial community antenna service.

The Court has in mind that the Congress has thus far seen fit to impose limitations upon the reception of television broadcasts only in the one respect that one broadcaster may not rebroadcast the program of another without the consent of the latter. (FCA, 47 USC 325 (a)).

As indicated in this Court's previous discussion of the history of this so-called consent provision, community antenna services are not "broadcasters" within the meaning of the definition of "broadcasting" as presently stated in the Federal Communications Act. FCA, 47 USC 153(a)). The Congress has consistently refused to adopt amendments necessary to make that provision applicable to community antenna services. Community antenna services, therefore, are not required by the Act as presently written to obtain the consent of a broadcasting station before picking up its signal and its programs.

So it is that under present national policy, community antenna services remain a permissible and as yet unregulated means of television reception. Accordingly, the Federal Communications Commission has held that it does now have jurisdiction over community antenna services.

It should be noted, however, that the Federal Communications Commission has recently requested Congress to grant to it authority to regulate community antenna services by promulgating rules to protect local broadcasting stations against duplication of their programs by community antenna services. (See FCA, Public Notice B, dated February 23, 1962.

In that notice the Commission expresses its concern over problems posed for the national system of free television by the expansion of community antenna systems into areas already served by a local licensed broadcasting station.

Discussing the very situation presented in our pending case from the point of view of public interest, the Commission calls attention to the serious competitive impact of such community antenna services upon local broadcasting stations and the threatened economic elimination of the latter as a result of community antenna dupication of the very programs upon which the local station relies for its sponsor-advertising revenues—a result which, the commission points out, would completely deprive surrounding rural populations, which are not served by community antenna, and such portion of the urban community population as could not afford the community antenna's monthly service charges, of all television reception, and, further, would deprive the whole community of important local interest programs, local projects, news, weather, etc., which can be provided only by a local broadcasting station.

Indeed, without waiting for a grant of power over community antenna services, the Commission in *Carter Mountain Transmission*, Docket No. 12931, February 16, 1962, has sought to provide an indirect solution to this problem of public interest by using its power to license common carriers under Sub-Chapter II of the Act. In that case the Commission refused to grant an application by a microwave common carrier to install a microwave relay to convey television signals for a com-

munity antenna service, holding that the application should be denied in the public interest until a satisfactory showing be made by the common carrier that the community antenna, which it proposed to serve, has arranged to avoid duplication of the local broadcasting station's programs.

Although these actions and declarations of the Federal Communications Commission are not determinative of the issues of the present case, they do shed light on the problems of public interest involved in the formation of national policy concerning the relationship between community antenna services and local broadcasting stations. Further, they become significant in the light of the Congressional history on the subject which, as pointed out in the previous opinion of this Court, clearly shows that the Congress, although not ready as yet to extend the consent provision to community antenna, has expressly and specifically disclaimed any intent of affecting one way or the other whatever private property rights may be involved in litigation of this kind between broadcasting stations and community antenna services. Indeed, the present Act, itself, provides that it shall not abridge or alter the remedies now existing in the common law or by statute. (Sec. 414).

It appears, therefore, that community antenna services, although now beyond the reach of the Federal Communications Commission, do not hold under the national policy any favored status that would exempt them from ordinary common law responsibility to others — broadcasting stations or otherwise.

It is true that in a certain sense a community antenna

service may be regarded as merely a device through which members of the public are able to accomplish what each might do for himself if possessed of adequate antenna facilities — and this Court so regarded community antenna in the previous related cases.

We there noted, however, the view of the Supreme Court in *International News Service*, supra, to the effect that the right of the public may be one thing and commercial competition quite another. We did not apply that view in the previous cases for the stated reason (Intermountain v. Idaho, supra, at p. 328) that the relationship in that case between the public, the Twin Falls community antenna and the Salt Lake City stations was not fairly comparable with the relationships in the International News case.

In the present case the claims of the broadcasting station, grounded upon a contractual right of exclusivity, are different than the claims of the broadcasting stations in the previous cases wherein no such right was relied upon nor could have been recognized. Likewise, in the present case, the relationship between the community antenna and the broadcasting station — both in competitive posture in the same community "precisely at the point where the profit is to be reaped" — are quite different than the relationships before the Court in the previous cases and is in our opinion fairly comparable to the situation in the International News case.

We believe that in the context of the present case the community antenna service must be regarded as in effect a commercial enterprise in competition with Station KLIX for television viewers — the source of the profit

sought by each -- and that the community antenna is in effect "reproducing" in the Twin Falls community network programs for which KLIX has acquired a valid, contractual right of first call. (See, re comparable case of "reproduction," Buck v. Jewell-LaSalle Co., 283 U.S. 191 (1931)).

STATE v. NATIONAL JURISDICTION

We return now to the question whether under these circumstances recognition of the contractual exclusivity right of KLIX and protection thereof in this case by injunctive relief against the community service would invade any preempted field of national jurisdiction or conflict in any way with national policy.

In cases of obvious conflict with the Federal Communications Act and the federal policy stemming from it, the Courts have declared that the Act constitutes a plenary exercise of the power of the national government to occupy and regulate the field of radio and television and that in such cases state law, common law or statute, is abrogated to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress. *Allen B. Dumont v. Carroll,* 86 F. Supp. 813 (E. Pa. 1949); *Farmers v. Day,* 89 N.W. 2d 102, aff'd. 360 U.S. 525 (1958). (See, also Sola v. Jeffersen, 317 U.S. 173 (1942)).

In *Standard Radio v. Chronicle Publishing Co.,* 182 Cal. 2, 16 Cal. Rep. 246, wherein the state court was called upon to determine in the first instance the reason-

ableness of certain exclusivity arrangements, the Court properly reached the same conclusion.

The Courts have recognized, however, that the Federal Communications Act is not designed primarily as a new code for the adjustment of private rights (FCC v. Pottsville Broadcasting Co., 309 U.S. 123 (1940)) and that state courts, or federal courts, when called upon to apply state law, have jurisdiction to hear and determine private disputes between broadcasting companies and third parties even though the dispute may involve the effect of the Federal Communications Act and Regulations upon those private rights (Regents of New Mexico v. Albuquerque Broadcasting Co., 158 F. 2d 900, CCC 10 (1947), or may result in the elimination of a licensed facility (Radio Station WOW v. Johnson, 325 U.S. 120 (1944), or may involve enforcement of a contract repudiated by one party to meet licensing conditions imposed by the Federal Communications Commission (Regent of Georgia v. Carroll, 338 U.S. 586 (1949)). (See also: U.S. Radio Corporation of America, 358 U.S. 344 (1959)).

In the present case the Court is not called upon to determine the reasonableness of the exclusivity arrangement between the broadcasting station and the network organizations from the point of view of the public interest. That determination has already been made by the Federal Communications Commission. The Court, finding and accepting an exclusivity arrangement between KLIX and the network organizations, which is in conformity with national policy, is merely called upon to determine whether KLIX is entitled to protection of

that contractual right under such common law doctrines as may be applicable.

Such an approach could not involve confusion between state common law and the national policy on the subject of exclusivity because the state court must accept and recognize only such exclusivity arrangements as are permissible under the national Act, regulations and policy at any given time. Only with respect to the ancillary question of state interpretation and application of the common law doctrine of tortious interference with contractual rights and the doctrine of unfair competition would a lack of uniformity be conceivable.

The only alternative to judicial determination according to the applicable common law would be the determination of all such private disputes over contractual rights between broadcasting stations or between broadcasting stations and others by the Federal Communications Commission.

However, as indicated in the cases cited, the Federal Communications Act was not designed as a code for the determination of such private rights. It is a limited scheme for the regulation of radio and television transmission through the licensing of otherwise freely competitive broadcasting stations whose disputes, among themselves or with others, are beyond the power of the Commission — and for which it has no adjudicatory procedures. There is, therefore, no question here of primary jurisdiction of the Commission as there was in *San Diego v. Gorman*, 359 U.S. 236 (1959) — a case arising under the National Labor Relations Act which unlike the Federal Communications Act, sets up a com-

prehensive scheme for the investigation, hearing and adjudication of labor disputes.

The difference between the Federal Communications Act and such other more comprehensive regulatory acts has been recognized by the Supreme Court in *United States v. RCA*, 358 U.S. 334, 345 seq., (1958), wherein the Court made it the ground for holding that the primary jurisdiction doctrine did not preclude antitrust suits against broadcasters in the federal courts, saying ". . . the legislative history of the Act (FCA) reveals that the Commission was not given the power to decide antitrust issues as such. . . . Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by the Federal Courts can work no mischief. The justification for primary jurisdiction accordingly disappears."

The only possible way for the Federal Communications Commission to approach the subject of the present dispute between KLIX, the broadcaster, and Cable Vision, Inc., the community antenna, would be the indirect approach taken by the Federal Communications Commission in the Carter Mountain Transmission case, already noted, wherein a microwave common carrier, similar to co-plaintiff Microwave, Inc., here, was denied, upon grounds of public interest, a license which would have enabled it to serve a community antenna. Such a denial of a common carrier license to Microwave, Inc., in this case would not determine the contractual property right here asserted by KLIX against the community antenna, Cable Vision, Inc., which could, as pointed out in the previous opinion of this Court, continue to operate

in virtually the same way by means other than a microwave common carrier.

THE APPLICABLE COMMON LAW

It has been generally held as a matter of common law under the doctrines of tortious interference with contractual rights, and under the doctrine of unfair competition as well, that one who contractually acquires, either expressly or impliedly by reference to a general industry wide custom, the exclusive right to the first call of entertainment programs, is entitled to protection of that valuable economic right, not only against the grantor, but also against acts of third persons which tortiously and unfairly prevent exploitation of the right or diminish its value. This is true without regard to and apart from any question of copyright ownership of particular program content. (See, Alcazon Amusement Co. v. Mudd & Cooley Amusement Co., 204 Ala. 509, 86 So. 209 (1920); Montgomery Enterprises v. Empire Theatre Co., 204 Ala. 566, 86 So. 880, 19 A.L.R.987; Wells v. National Exhibitors Circuit, 149 Ga. 200, 99 S.E. 615 (1919); Peekskill Theatres v. Advance Theatrical Co., 206 App. Div. 138, 200 NYS, 726 (1923); Meyer v. Washington Times Co., 76 F. 2d 988 (D.C. Cir. 1935)).

Also, as recognized by this Court in its previous opinion, the same result has been accomplished upon grounds of unfair competition in cases dealing with radio and television programs. *Mutual Broadcasting System v. Muzac Corp.*, 177 Misc. 489, 30 N.Y.S. 2d 419 (1941); *Twentieth Century Sporting Club v. Transradio Press Service*, 165 Misc. 71, 300 N.Y.S. 159 (1937); *National*

Exhibition Co. v. Fass, 133 N.Y.S. 2d 379 (1954) aff'd. 136 N.Y.S. 2d 358; *Pittsburgh Athletic v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Associated Press v. KVOS*, 80 F. 2d 575 (9th Cir. 1935); *Veatch v. Wagner*, 116 F. Supp. 904 (Ala.); *Twentieth Century Sporting Club v. Massachusetts Charitable Mechanic Assn.*, Equity No. 60236, Massachusetts Superior Court, June 2, 1948, discussed in Solinger, "Unauthorized Uses of TV Broadcasts," 48 Col. L. Rev. 848 (1948); *Uproar Co. v. NBC*, 8 F. Supp 358 (D. Mass. 1934), *Southwest Broadcasting Co., v. Oil Center Broadcasting*, 210 S.W. 2d 230 (1947); see also, *Ettore v. Philco Broadcasting Co.*, 229 Fed. 2d 481 (3d Cir. 1956).

For the foregoing reasons the Court, finding that KLIX has acquired a contractual exclusive right to the first run of network and film programs in the community of Twin Falls with which plaintiffs, Cable Vision and Microwave, Inc., are tortiously interfering and with which they are unfairly competing to the detriment of KLIX and finding, further, that KLIX has no adequate remedy at law except through the issuance of a preliminary injunction herein, concludes and orders that such preliminary injunction should issue prohibiting defendants, during the pendency of this action or until further order of the Court, from duplicating for community antenna subscribers in the community of Twin Falls, Idaho, any network or film program to which KLIX exercises a right of first run.

This memorandum decision is subject to the preparation and signing of Findings of Fact and Conclusions

of Law as provided by Rule 52(a) R.C.P. and a formal order of injunction as provided by Rule 65(c)(d) R.C.P. which shall be prepared and proposed by counterclaimant, KLIX, served upon other parties and presented to the Court upon notice for approval.

Dated: July 26th, 1962.

W. T. SWEIGERT
William T. Sweigert
United States District Judge

Supplemental Memorandum of Opinion

(Reported at 211 F. Supp. 59)

SWEIGERT, D. J.

This memorandum supplements the memorandum of the Court in Cable Vision v. KUTV dated July 26, 1962.

The Court wishes to supplement its previous memorandum with respect to KLIX's claimed exclusive rights in so-called "delayed" broadcasts and with respect to the syndicated and feature films referred to in note 3 at page 3 of the previous memorandum.

Delayed broadcasts: It appears from the record that it is the practice for a network affiliate station, such as KLIX, which holds a right of first showing of a network program in its community at the time of origination, to arrange sometimes with the network to show the program at a later time, usually within 21 days.

When such arrangements are made the network either makes a film of the original broadcast available for use by KLIX or authorizes KLIX itself to film the original broadcast for the delayed broadcast.

The question is whether such a delayed broadcast comes within the exclusivity arrangements permitted by the proviso to FCC Regulations, Sec. 3.568, Subsec. B, to which we referred in our previous memorandum.

Although we believe that this Court should construe such a proviso narrowly rather than broadly, we find indication in the Barrow Report that the FCC has recognized this custom of delayed broadcasts and has specif-

ically considered whether a network should be required — in the case of a request by the station for a delayed broadcast — first to offer such broadcast to another station in the community for showing at the originating broadcast time; in other words, whether such a deviation in the exercise of the first run option of the station goes beyond the scope of the permitted exclusivity.

The FCC took the position that any such proposed requirement would have serious drawbacks: "It requires that the Commission set-up affirmative standards as to the circumstances under which a station may not exercise the rights of first call. However, the fact that a network program may be carried on a delayed rather than a live basis is not per se contrary to the public interest. Indeed, the contrary argument may be made that the appropriate time for the showing of any program should be determined by each station, community by community and program by program. The proposal also has the disadvantage that it restrains the advertiser's freedom to choose between a delayed period on the network's affiliate and placement of the program on another station in the market." (Barrow Report, p. 276, Def.'s Ex. 21).

This indicates an FCC interpretation to the effect that the practice of delayed broadcasts is well within the permitted exclusivity proviso of FCC, Regs., Secs. 3.568, Subsec. B.

Therefore, in our opinion, such delayed broadcast exclusivity arrangements between station KLIX and the networks are entitled to protection by the preliminary injunction for the same reasons that broadcasts at the time of origination are entitled to protection.

Syndicated and feature films: It appears from the record that television stations, such as KLIX, contract with film distributors for the exclusive first showing in the community of syndicated films — i.e., the various popular series identified by title and released for showing one episode at a time — and for the first showing in the community of various feature movie films from the libraries of film suppliers.

For the purpose of convenience and economy, the practice is for the film distributor to arrange for making the film roll available to a group of stations in a given general area for use during the same approximate period. Each station entitled to use the film roll passes it on to the next local station so entitled. Thus, such films, although used at the same approximate time and place, are necessarily used on different days by the various stations entitled to show them. In the present case, the film roll would generally be sent for use first by the stations in Salt Lake City, Utah, and subsequently passed on to KLIX, Twin Falls, for its use on a different day.

With respect to both syndicated films and feature films, the distributor precludes itself, either by express agreement or by an agreement implied from the custom of the industry from granting to other exhibitors in the community the right to exhibit the film until the station has had an opportunity to enjoy its right of first showing.

Under these circumstances, if the community antenna service at Twin Falls picks up programs of syndicated or feature films as first broadcast from a Salt Lake station for exhibition to its Twin Falls subscribers, then

certainly, the right of first showing in the Twin Falls community, for which KLIX has paid, is rendered valueless or at least is substantially impaired.

Although these contracts between stations and film supply companies for the first run of films are not technically within the domain of network broadcasting for which FCC Regulations are designed, they are similar to, and we recognize them as being no broader than, the exclusivity permitted by the proviso of FCC Regulations, Sec. 3.568, Subsection B, concerning network broadcasts.

The Court is of the opinion that such exclusive rights for the first showing of syndicated or feature films are entitled to protection under the circumstances here presented — under the doctrines of unfair competition and tortious interference with contractual relationships — for the same reasons that rights to broadcast network programs are entitled to protection.

In our memorandum of July 26, 1962, the Court speaking of the common law doctrine of tortious interference with contractual rights, said, "one who contractually acquires . . . the exclusive right to the first call of entertainment programs is entitled to protection . . . against acts of third persons which tortiously and unfairly prevent exploitation of the right or diminish its value."

The cases cited thereafter dealt with situations in which the tortfeasor had induced in some way the promisor to breach his contract.

In this case, the community antenna service has not

induced any breach of contract by the networks or the film suppliers, who are the grantors of KLIX's right of exclusivity. However, the community antenna's pick up of programs from Salt Lake stations and from other stations in the area for its competitive purposes in the Twin Falls community defeats or impairs the purpose and the value of the exclusive rights of KLIX in such programs.

It has long been established that the doctrine of tortious interference with such valuable contractual rights is not limited to third persons who in some way induce the grantor of the right to grant similar rights to them in violation of the exclusivity agreement. On the contrary, it has long been recognized that any one who so tortiously and unfairly interferes with such an economically advantageous contractual relationship as to make its performance possible or more onerous and thus to impair or defeat the value of the right is liable to the grantee of the right. *Livermore v. Crane*, 26 Wash. 529, 67 P. 221 (1901); *Glover v. Lee Higginson Corp.*, 95 F. Supp. 504 (D. Mass., 1950); *McNary v. Chamberlain*, 34 Conn. 384, 91 Am. Dec. 732 (1867); *Navarro v. Fiorita*, 62 N.Y.S. 2d 730 (1946); *Prosser, Torts* 729-30 (2d Ed. 1955); 1 *Harper & James, Torts* 499-500; *Carpenter, Interference with Contract Relations*, 41 Harv. L. Rev. 728, 734-37 (1928).

We believe that the authorities cited in our previous memorandum — both those which deal with the doctrine of interference with contractual rights and those which deal with the doctrine of unfair competition — are applicable to the circumstances here presented.

This supplemental memorandum decision is subject to the preparation and signing of Findings of Fact and Conclusions of Law as provided by Rule 52(a) R.C.P. and a formal order of injunction as provided by Rule 65(c) (d) R.C.P., which shall be prepared and proposed by counterclaimant, KLIX, served upon other parties and presented to the Court upon notice for approval.

Dated: November 5th, 1962.

W. T. SWEIGERT
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CABLE VISION, INC., and IDAHO MICROWAVE, INC., *Appellants*,

vs.

KUTV, INC., THE KLIX CORPORATION, et al., *Appellees*.

No. 18,577

(July 15, 1964)

Reported at 335 F(2d) 348

On Appeal from the United States District Court for the District of Idaho

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Before: ORR, HAMLEY and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge:

In response to an antitrust action brought against it, KLIX-TV, appellees here, filed the counterclaim which is the subject of this appeal. Claiming exclusive rights by virtue of contract to the first run of its affiliated network television programs, it asserted that under Idaho law the activities of community antenna operators, appellants here, constituted tortious interference with those contractual rights and unfair competition in that the community antenna receives identical programs broadcast by other and distant stations and distributes them for profit simultaneously with the KLIX airings.

An extended trial was had. The district judge rendered his decision by a written opinion reported in 211 F. Supp. 47 (D.C. Ida. 1962). As a preliminary issue and before reaching the merits the District Court concluded that Congress had not pre-empted the adjustment of property rights in the communication field by passage of the Communications Act of 1934. We agree.

On the merits, the District Court granted relief on the alternative grounds that the activities of the antenna service constituted unfair competition and interference with contract under Idaho law. It noted the absence of state statute or relevant decision of the Idaho Supreme Court but nevertheless concluded that Idaho would recognize as part of its common law, claims for contract interference like those asserted by appellees. Additionally the court declared that appellants were guilty of both torts and issued an order based upon both grounds for the issuance of an appropriate injunction to preserve and make effective appellees' exclusive first-run rights to its affiliate network programs as against these appellants (but not against non-commercial individual antenna owners).

Before reaching its conclusion the court dealt at length with communications policy. Although it expressly recognized that Federal Communications policy was " . . . not determinative of the issues of the present case . . . " (*Cable Vision, Inc., v. KUTV, Inc.*, 135 U.S.P.Q. 2, 211 F. Supp. 47, 55 [D.C. Ida. 1962]), the court deemed it relevant. The court noted that Congress had as yet refused to extend F.C.C. regulation to the community antenna practice complained of despite specific

proposals to the contrary. Nonetheless, the court found Congressional sanction for the result reached because Congress had not sought to " . . . abridge or alter the remedies now existing in the common law or by statute. (Sec. 414)." *Cable Vision, Inc. v. KUTV, Inc.*, supra, 211 F.Supp. at 56.

After the appeal was taken and the matter had been submitted, the Supreme Court decided the companion cases of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. (1964), and *Compco Corporation v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). On the suggestion of counsel for appellants and those decisions settled issues of law relevant to this case and were dispositive of this appeal, we vacated the order of submission and called for supplemental briefs. We also requested that the case of *R.C.A. Mfg. Co. v Whiteman*, 119 F.2d 86 (2d Cir. 1940), cert. den. 311 U.S. 712, be evaluated to determine of it had new significance in view of the holdings in *Sears* and *Compco*. Supplemental briefs have now been filed and the case stands finally submitted.

II

At the outset, we note and emphasize that the trial court reached its conclusion " . . . without regard to and apart from any question of copyright ownership of particular program content," *Cable Vision, Inc., v. KUTV, Inc.*, 211 F. Supp. at 58. It held,

> " . . . as a matter of common law under the doctrines of tortious interference with contractual rights, and under the doctrine of unfair competition as

> well, that one who contractually acquires, either expressly or impliedly by reference to a general industry-wide custom, the exclusive right to the first call of entertainment programs, is entitled to protection of that valuable economic right, not only against the grantor, but also against acts of third persons which tortiously and unfairly prevent exploitation of the right or diminish its value." *Ibid.*

The unexamined premise in the holding and the cases cited in support of it is that common-law theories of recovery may be asserted to redeem what are in essence copyright interests. As we read *Sears* and *Compco*, however, only actions for copyright infingement or such common-law actions as are consistent with the primary right of public access to all in the public domain will lie.

In *Compco*, the court emphasized that the federal policy found in Art. I §8, Cl. 8 of the Constitution and in the implementing federal statutes is to allow " . . . free access to copy whatever the federal patent and copyright laws leave in the public domain." 376 U.S. at 237. The public domain was broadly delineated in *Sears*: that which is either not copyrighted, not copyrightable or on which the copyright has expired is in the public domain. 376 U.S. at 231.[1] See also *Flamingo Telefilm Sales, Inc. v. United Artists Corp.*, 32 U.S. L.Week 2579 (May 12, 1964). Thus when an article is unprotected by a patent or copyright, state law may not forbid a person not the originator to merely copy

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[1] The principles announced in Sears and Compco and cited as authority here are equally applicable to patent and copyright law. Compare Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 232-233 (1964) with G. Ricordi & Co. v. Haendler, 194 F.2d 914, 916 (2d Cir. 1952).

and commercially exploit that article, for such a law would enable the originator to accomplish with the left hand of state authority what he was unable to accomplish with the right hand bearing the authority of the primary federal interest. *Sears, Roebuck & Co. v. Stiffel Co.*, supra, 376 U.S. at 232-233. No state intrusion of the federal field is permissible unless the law of the state meshes in purpose and effect with the announced objectives of federal copyright law. *Sears, Roebuck & Co. v. Stiffel Co.*, supra, 376 U.S. at 231. A limited ambit of operation is accorded state law but it may be exercised only insofar as consistent with the paramount federal interest. *Compco Corp. v. Day-Brite Lighting*, supra, 376 U.S. at 238. Accordingly, the Supreme Court expressly mentioned the state common-law action of unfair competition with the element of "palming off," an element Mr. Justice Holmes, concurring in *International News Service v. Associated Press*, referred to as " . . . an infusion of fraud . . . necessary to turn a flavor into a poison . . ." so as to permit " . . . a remedy from the law . . . without legislation . . ." (248 U.S. at 247-248) as surviving its decision.[2] And state courts have subsequently decided that a state action based upon common-law copyright also survives (See *Woods Associates Inc. v. Skene*, 32 U.S. L.Week 2595 [May 19, 1964]; *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.*, 32 U.S. L.Week 2516 [April 14, 1964], a position which finds explicit support in *Sears*, 376 U.S. at n. 7, p. 231.

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[2] Chafee, "Unfair Competition," 53 Harv. L. Rev. 1289 at 1319 (1940), finds justification for this single exception.

III

Applying *Sears* and *Compco's* composite thesis to the case at hand, we view it as dispositive of appellee's two grounds for relief. Save for the limited protection accorded the creator of literary and intellectual works under the Copyright Act or its exceptions—and here appellees concede they are not asserting a claim for copyright infringement—anyone may freely and with impunity avail himself of such works to any extent he may desire and for any purpose whatever subject only to the qualification that he does not steal good will, or, perhaps more accurately stated, deceive others in thinking the creations represent his own work.

Here the District Court enjoined activity that lacked the element of palming off. It is incontrovertible that all broadcasts are received and distributed by the community antenna without any modification of program content; therefore no question of "implied misrepresentation" by failing to give the originator proper credit, a misrepresentation present in *International News Service v. Associated Press*, supra, 248 U.S. 215 (1918), is involved in this case. We are clear that there is lacking that taint "necessary to turn a flavor into a poison" justifying judicial relief without Congressional authorization. To the extent, then, that the District Court holding extended a new protectible interest beyond what the copyright laws confer, it " . . . interfere[d] with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain."[3] *Compco Corp. v. Day-Brite Lighting*,

[3] It is urged, however, that the holding below must be sustained because the period of first call granted by the exclusive

Inc., 376 U.S. 234, 237 (1964). This same principle likewise applies to appellees' claim of contract interference. Parties by the mere expedience of an exclusive contract can not "bootstrap" into existence rights from subject matter which at their source lie in the public domain. *Desclee & CIE, S. A., v. Nemmers*, 190 F. Supp. 381, 389 (D.C. Wis. 1961). Cf. *Field v. True Comics*, 89 N.Y.S. 2d 35 (N.Y. Sup. Ct. 1949). To allow these appellees relief on an alternative ground not substantially differing in gravamen from other relief foreclosed in operative effect by the Supreme Court's explicit holding would be to enshrine form at the expense of substance.

In sum,

> " 'The general rule of law,' says Mr. Justice Brandeis [*International News Service v. Associated Press, supra*, 248 U.S. at 250], 'is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become after voluntary communications to others, free as the air to common use.' The Constitution and Congress have made some exceptions to this general rule, by the patent and copyright laws. They have rewarded inventors and authors for their creativeness by granting them monopolies for a limited time and under carefully fixed conditions. The courts will be creating new and perpetual monopolies of their

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license is within the term of monopoly contemplated by the copyright statute. That is, of course, true as to programs protected by copyright. But the vice of the argument lies in what it ignores. To the extent that the licenses confer rights beyond those granted by copyright law and protect programs not copyrighted, they counter the federal policy of free access and must therefore yield.

> own if they enjoin non-passing-off appropriation of unpatented and uncopyrighted material. This they are properly reluctant to do. They may want to stop a particular defendant but if so they ought to stop everybody."[4] Chafee, *Unfair Competition*, 53 Harv. L. Rev. 1289, 1318 (1940).

IV

It could be contended, however, that the community antenna is misappropriating, "reaping where it has not sown," and therefore this court should protect a "quasi property right" of the kind involved in *International News Service v. Associated Press*, supra, 248 U.S. 215 (1918). But that case, oft held by the Second Circuit as applicable only to its special facts[5] is readily distinguishable. *International News* involved news which for practical reasons is not subject to copyright. Here, on the other hand, much of the material is copyrighted. *International News* involved an "implied misrepresentation"; here, as we have already seen, there is none. Perhaps most significant for purposes of bringing an action, *International News* involved an action brought by the originator; here the action is brought by an exclusive licensee.[6] In short, few of the considerations

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[4] The District Court noted that a lack of national uniformity would be conceivable under its holding. Cable Vision Inc. v. KUTV, supra, 211 F. Supp at 57. The result we reach assures nationwide uniformity.

[5] G. Ricordi & Co. v. Haendler, 194 F.2d 914, 916 (2d Cir. 1952); Cheney Bros. v. Doris Silk Co., 35 F.2d 279, 280 (2d Cir. 1929); R.C.A. Mfg. Co. v. Whiteman, 114 F.2d 86, 90 (2d Cir. 1940); Millinery Creators Guild v. Federal Trade Commission, 109 F.2d 175 (2d Cir. 1940).

[6] Other grounds of distinction relevant to the factual situation at hand may be found in Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc., 196 F. Supp. 315 (D.C. Ida. 1961).

impelling the result in *International News* are present here. On the other hand, many reasons mitigating against such a result are.

True, the activities of the community antenna could be described as " . . . inconsistent with a finer sense of propriety . . . " (248 U.S. at 257). But to grant appellees relief without Congressional authorization on other grounds not consistent with the copyright act is, in effect, to recognize a new protectible interest. To quote from Justice Brandeis, dissenting:

> "Such taking and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him." [284 U.S. at 258] * * * "The written law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded."

(248 U.S. at 262-263).

More important, however, is another consideration urged by Justice Brandeis:

> "Courts are ill equipped to make the investigations which should precede a determination of the limit ations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in an effort to redress a newly disclosed wrong, although the propriety of some remedy appears clear." (248 U.S. at 267).

Grant that the conclusion reached by the District Court would appear to be consistent with the National Communications policy as formulated by the F.C.C.[7] But as the District Court recognized, F.C.C. policy is " . . . not determinative of the issues of the present case . . ." *Cable Vision, Inc. v .KUTV*, supra, 211 F.

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[7] C.F.R. §73.132 Territorial exclusivity. "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This section shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Supp. at 55. And it should be emphasized that it is Congress and those whom it delegates who are charged with regulation in the public interest. Congress may, after weighing the competing interests involved, find it to be good policy to grant an additional remedy. But the courts are not charged by our constitutional system as arbiters of good policy. That function is reserved to Congress. In short, while it makes an appealing picture to see courts and administrative agencies hand in hand redeeming national communications policy, the fact remains that it is not the proper function of courts to do so.[8]

V

All this is not to say that appellees are necessarily without remedy. They may (if able to meet the requirements hereinafter specified) be able to maintain an action for infringement of those programs protected by statutory copyright and to prosecute a claim for common law copyright violation as to any others which they contend have not yet been "published" within the contemplation of the law of common law copyright.[9]

It is settled law that the copyright owner is an indispensable party to enforcement of a copyright claim. *Waterman v. Mackenzie*, 138 U.S. 252 (1891). But overstrict application of this doctrine led to sometimes harsh results where there had been merely a partial assignment of the copyright subject matter. Therefore

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[8] Other considerations supporting the result we reach are noted by Chafee, supra n. 2 at 1317-1321.

[9] But cf. Z Bar Net v. Helena Televisions, Inc., 125 U.S.P.Q. 595 (1960).

it has been held that while an exclusive licensee may not alone maintain an infringement action (*Widenski v. Shapiro, Bernstein & Co., Inc.*, 147 F.2d 909 [1st Cir. 1945]), he may do so, however, if he joins the copyright owner (*Manning v. Miller Music Corp.*, 174 F. Supp. 192 [D.C.S.D.N.Y. 1959]; *Field v. True Comics, Inc.*, 89 F.Supp. 611 [D.C.S.D.N.Y. 1950]) and may even join the owner as an involuntary party. *Pratt and Whitney v. United States*, 153 F.Supp. 409 (Ct. Cl. 1957); *Collins v. Hupp Motor Car Corp.*, 22 F.2d 27 (6th Cir. 1927).[10] These cases have followed the doctrine of *Independent Wireless Co. v. Radio Corporation of America*, 269 U.S. 459 (1926), which applied equitable principles in permitting an exclusive licensee to redeem his interest in an infringement action by joining the owner. As the court there said:

> "It seems clear . . . that the owner of a patent who grants to another the exclusive right to make use . . . which does not constitute a statutory assignment, holds the title to the patent in trust for such a licensee, to the extent that he must allow the use of his name as plaintiff in any action brought at the instance of the licensee . . . to obtain damages for the injury to his exclusive right by an infringer or to enjoin infringement of it . . . [T]he implied obligation of the licensor to allow the use of his name is indispensable to the enjoyment by the licensee of the monopoly which by personal contract the licensor has given." (269 U.S. at 469).

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[10] These principles from patent law are properly applied to copyright law. Widenski v. Shapiro, Bernstein & Co., supra, 147 F.2d at n.2 p. 911.

"By a request to the patent owner to join as co-plaintiff, by notice of the suit after refusal and the making of the owner a co-plaintiff, he is given full opportunity by taking part in the cause to protect himself against any abuse of the use of his name as plaintiff, while on the other hand the defendant charged with infringement will secure a decree saving him from multiplicity of suits for infringement." (269 U.S. at 474).

In conclusion, we hold that unless appellees are able to demonstrate a protectible interest by virtue of the copyright laws or bring themselves within the contemplation of some other recognized exception to the policy promoting free access to all matter in the public domain, they cannot prevail. *Accord, Desclee & CIE. S.A., v. Nemmers*, 190 F.Supp. 381 (D.C.Wis. 1961). *Cf. R.C.A. Mfg. Co .v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), cert. den. 311 U.S. 712; *G. Ricordi & Co. v. Haendler*, 194 F.2d 914 (2d Cir. 1952); *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929), cert. den. 281 U.S. 728. Relief beyond what the copyright laws confer must be sought from Congress, not the courts. *Globe Newspaper Co. v. Walker*, 210 U.S. 356 (1908); *Hills & Co. v. Hoover*, 220 U.S. 329, 337 (1911).

The judgment is vacated and the cause is remanded to the District Court to permit appellees to amend their counterclaim if they are able.